United States Court of Appeals

for the Second Circuit

APPENDIX

75-4051

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P/S

United States Court of Appeals

For the Second Circuit.

FEDDERS CORPORATION,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION.

APPENDIX.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER,
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DENNIS HYNES,
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Federal Trade Commission,
Washington, D. C. 20580

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975

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UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

IN THE MATTER

of

FEDDERS CORPORATION.

Docket 8932
CCA 75-4051

Certified List of Documents Comprising the Record

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Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

IN THE MATTER

of

FEDDERS CORPORATION, a corporation.

Docket No. 8932

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Fedders Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, New Jersey.

PARAGRAPH TWO: Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders Model ACL20E34X Room Air Conditioners (hereinafter referred to as Fedders ACL room air conditioners).

PARAGRAPH THREE: In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to

be transported from its place of business in the State of New Jersey to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FOUR: In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

PARAGRAPH FIVE: In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said ACL room air conditioners, including but not limited to, advertisements printed in newspapers located in various states of the United States and in the District of Columbia, which newspapers are disseminated across states lines.

PARAGRAPH SIX: Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the print advertisement for Fedders ACL room air conditioners:

> RESERVE Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

PARAGRAPH SEVEN: By and through the use of the aforesaid statements and representations, respondent has

represented, directly or by implication, that reserve cooling power is a unique feature of Fedders home air conditioners, not found in other air conditioners.

PARAGRAPH EIGHT: In truth and in fact, "reserve cooling power," referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders ACL room air conditioners. In fact, comparable air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

Therefore, the statements and representations referred to in Paragraphs Six and Seven were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Five, Six, and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH NINE: By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders ACL room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

PARAGRAPH TEN: In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders ACL room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

Therefore, the statements and representations referred to in Paragraphs Six, Nine, and Ten were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or

deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH ELEVEN: By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders ACL home air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Six and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TWELVE: The use by respondent of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PARAGRAPH THIRTEEN: The aforesaid acts or practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 11th day of June A. D., 1973 issues its complaint against said respondent.

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the 2nd day of August A. D. 1973, at 10:00 o'clock is hereby fixed as the time and 1101 Building, 11th & Pa. Avenue, N. W., Washington, D. C. as the place when and where a hearing will be had before an administrative law judge the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the administrative law judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under

Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the administrative law judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Fedders Corporation might be inadequate fully to protect the consuming public or the competitive conditions of the air conditioning industry, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I

It is ordered that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the respective products hereinafter referred to, do forthwith cease and desist from:

1. representing, directly or by implication, that an increase in cooling capacity at high loading conditions of Fedders room air conditioners is a unique feature of such air conditioners;

2. representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any other material respect, unless such is the fact;

3. representing, directly or by implication, that Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions of use, unless at the time such representation is made, respondent has a reasonable basis for such representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

4. making, directly or indirectly, any other statement or representation in any advertising or sales promotional material as to the performance characteristics of any Fedders air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

5. failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

   (a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency en-

gaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics of, or the uniqueness of any feature of, any Fedders air conditioning product or system; and

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 5 shall be in effect for a period of ten (10) years from the date this order becomes final.

IT IS FURTHER ORDERED that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

IT IS FURTHERED ORDERED that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the order served upon it, file with

the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 11th day of June A. D., 1973.

By the Commission.

CHARLES A. TOBIN,
Secretary.

(Seal.)

Answer.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

Respondent, as and for its answer to the complaint:

1. Admits PARAGRAPH ONE.

2. Admits so much of PARAGRAPH TWO as alleges that respondent is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners. Denies each and every other fact alleged in PARAGRAPH TWO and avers that Fedders has never manufactured or sold any air conditioner bearing Model #ACL203DX.

3. Admits PARAGRAPH THREE.

4. Admits PARAGRAPH FOUR.

5. Admits PARAGRAPH FIVE as to room air conditioners, but not as to "ACL room air conditioners" as defined in PARAGRAPH TWO of the Complaint.

6. As to PARAGRAPH SIX, admits that the statement beginning with the word "RESERVE" and ending with the word "days" set forth in PARAGRAPH SIX was contained in advertisements disseminated by respondent, and denies each and every other fact alleged in PARAGRAPH SIX.

7. As to PARAGRAPH SEVEN, admits that by the use of the statement specifically set forth in PARAGRAPH SIX of the complaint respondent has represented, directly or by implication, that "reserve cooling power" is a unique feature of Fedders home air conditioners not found in other such air conditioners, and denies each and every other fact alleged in PARAGRAPH SEVEN.

Answer

8. As to the first sentence of PARAGRAPH EIGHT, admits that "reserve cooling power", insofar as those words refer to an increased cooling capacity at higher loading conditions, is not a unique feature of Fedders room air conditioners, and denies each and every other fact alleged in that sentence; as to the second sentence of PARAGRAPH EIGHT denies knowledge or information sufficient to form a belief; and denies each and every fact alleged in the second paragraph of PARAGRAPH EIGHT, which is unnumbered.

9. As to PARAGRAPH NINE, admits that by the use of the statement specifically set forth in PARAGRAPH SIX of the complaint, respondent has represented, by implication, that, at the time said statement was made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at higher loading capacity under customary conditions of use, and denies each and every other fact alleged in PARAGRAPH NINE.

10. Denies each and every fact alleged in PARAGRAPH TEN, including both the first paragraph thereof and the second unnumbered paragraph thereof.

11. As to the first sentence of PARAGRAPH ELEVEN, admits that by the use of the statement specifically set forth in PARAGRAPH SIX of the complaint, respondent represented that Fedders room air conditioners as used in homes, compared with other room air conditioners, have a significantly increased cooling capacity at higher loading capacity under customary conditions of use, and denies each and every other fact alleged in said sentence. Denies each and every fact alleged in the second sentence of PARAGRAPH ELEVEN and denies each and every fact alleged in the second paragraph of PARAGRAPH ELEVEN, which is unnumbered.

Answer

12. Denies each and every fact alleged in PARAGRAPH TWELVE.

13. Denies each and every fact alleged in PARAGRAPH THIRTEEN.

AS AND FOR AN AFFIRMATIVE DEFENSE

14. Respondent, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to "reserve cooling power" and has not since resumed the dissemination of any such material.

AS AND FOR A SECOND AFFIRMATIVE DFENSE

15. The relief sought by the Commission, as set forth in the form of proposed order attached to the complaint, is unjustifiably broad in its scope.

AS AND FOR MITIGATING CIRCUMSTANCES WHICH, IF THE CHARGES ALLEGED IN THE COMPLAINT ARE SUSTAINED, MUST BE CONSIDERED IN FRAMING ANY ORDER ENTERED HEREIN.

16. Respondent repeats and realleges the allegations of PARAGRAPH FOURTEEN with the same force and effect as if set forth at length hereat.

17. The only advertising claim of respondent alleged herein to have been false, misleading or deceptive is the claim of uniqueness of the "reserve cooling power" feature of its air conditioners. This claim was one of approximately ten advertising claims made by Fedders as

to which Fedders, by order of the Commission, was required, on or about October 13, 1971 to furnish supporting material. Fedders duly furnished such material in response to all of the other advertising claims above referred to, and none of such other claims has been challenged by the Commission.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER

Attorneys for Defendant,
Fedders Corporation,
Office & P. O. Address
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By s/ SYDNEY B. WERTHEIMER
A Partner of the Firm

Order Amending Complaint.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

By motion filed August 27, 1973, complaint counsel has moved to amend the complaint herein to correct a typographical error in respect to the model number of the air conditioner set forth in the complaint. Complaint counsel's motion would change the model number of the room air conditioner set forth in Paragraph Two of the complaint from ACL20E3DX to ACL20E3EX. The undersigned has been advised that respondent's counsel has no objection to the proposed amendment to the complaint.

Accordingly,

IT IS ORDERED that the complaint herein be, and it hereby is, amended as follows:

(1) Paragraph Two, line four, change Model ACL20-E3DX to Model ACL20E3EX; and

(2) Paragraphs Five-Six, Eight-Eleven, to the extent they incorporate by reference the model number designation in Paragraph Two, are amended to agree with Paragraph Two, as amended.

s/ ERNEST G. BARNES,
Administrative Law Judge.

September 5, 1973

Answer to Amended Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

Respondent, as for its answer to the complaint herein, as amended by order of the Administrative Law Judge dated September 5, 1973:

1. Admits PARAGRAPH ONE.

2. As to PARAGRAPH TWO, admits that respondent is now and has been engaged in the advertising, offering for sale, and distribution of Fedders air conditioners which it so advertised, offered for sale, sold and distributed included Model ACL20E3EX room air conditioners (hereinafter sometimes collectively called "Fedders ACL air conditioners"), and except insofar as admitted as aforesaid, denies each and every fact alleged in PARAGRAPH TWO.

3. Admits PARAGRAPH THREE.

4. Admits PARAGRAPH FOUR.

5. Denies PARAGRAPH FIVE on information and belief, such information and belief being based upon an analysis heretofore made by respondent of newspaper advertisements for Fedders room air conditioners within a representative test area, such test area having been created with the acquiescence of Commission counsel, to facilitate response to the Commissioner's subpoena in the within proceeding, and from which analysis it appeared that none of the advertisements disseminated by Fedders within the test area were for Model ACL20E3EX.

6. As to PARAGRAPH SIX, admits that the statement beginning with the word "RESERVE" and ending with the word "days" set forth in PARAGRAPH SIX was contained

in advertisements disseminated by respondent, and except as admitted as aforesaid denies each and every fact alleged in PARAGRAPH SIX.

7. As to PARAGRAPH SEVEN, admits that by the use of the statement specifically set forth in PARAGRAPH SIX of the complaint respondent represented that "reserve cooling power" is a unique feature of Fedders home air conditioners not found in the air conditioners of any other manufacturer; avers that the aforesaid representation of uniqueness of reserve cooling power was so infrequently made and constituted so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant, and except as admitted and averred as aforesaid, denies each and every fact alleged in PARAGRAPH SEVEN.

8. As to the first sentence of PARAGRAPH EIGHT, denies that the words "reserve cooling power", as used in the statement specifically set forth in PARAGRAPH SIX of the complaint, refers to an increased cooling capacity at high loading conditions, avers that such statement refers to the ability to function satisfactorily under conditions of extreme heat and humidity, admits that such ability is not a unique feature of Fedders ACL room air conditioners, and except as admitted as aforesaid denies each and every other fact alleged in that sentence; as to the second sentence of PARAGRAPH EIGHT, denies knowledge or information sufficient to form a belief; and denies each and every fact alleged in the second paragraph of PARAGRAPH EIGHT, which is unnumbered.

9. As to PARAGRAPH NINE, admits that by the use of the statement specifically set forth in PARAGRAPH SIX of the complaint respondent represented, by implication, that at the time said statement was made respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with the room air condi-

tioners of all other manufacturers, had a significantly superior ability to function satisfactorily under conditions of extremely high heat and humidity, and except as admitted as aforesaid denies each and every fact alleged in PARAGRAPH NINE.

10. As to PARAGRAPH TEN, admits the falsity of the implied representation which respondent, in the foregoing PARAGRAPH NINE of the within answer, has admitted, and except to the extent admitted as aforesaid, denies each and every fact alleged in PARAGRAPH TEN, including both the first paragraph thereof and the second unnumbered paragraph thereof.

11. As to the first sentence of PARAGRAPH ELEVEN, admits that by the use of the statement specifically set forth in PARAGRAPH SIX of the complaint respondent represented, by implication, that at the time said statement was made Fedders room air conditioners, compared with the room air conditioners of all other manufacturers, had a significantly superior ability to function satisfactorily under conditions of extremely high heat and humidity, and, except as so admitted denies each and every fact alleged in said sentence. As to the second sentence of PARAGRAPH ELEVEN, admits that at the time of the making of the statement admitted in the foregoing sentence of this Paragraph 11 of the within answer, respondent did not have a reasonable basis from which to conclude that such statement was the fact, and except as so admitted, denies each and every fact alleged in the second sentence of PARAGRAPH ELEVEN. Denies each and every fact alleged in the second paragraph of PARAGRAPH ELEVEN, which is unnumbered.

12. Denies each and every fact alleged in PARAGRAPH TWELVE.

13. Denies each and every fact alleged in PARAGRAPH THIRTEEN.

AS AND FOR AN AFFIRMATIVE DEFENSE

14. Respondent, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to "reserve cooling power" and has not since resumed the dissemination of any such material.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

15. The relief sought by the Commission, as set forth in the form of proposed order attached to the complaint, is unjustifiably broad in its scope.

AS AND FOR MITIGATING CIRCUMSTANCES WHICH, IF THE CHARGES ALLEGED IN THE COMPLAINT ARE SUSTAINED, MUST BE CONSIDERED IN FRAMING ANY ORDER ENTERED HEREIN

16. Respondent repeats and realleges the allegations of PARAGRAPH FOURTEEN with the same force and effect as if set forth at length hereat.

17. The only advertising claim of respondent alleged herein to have been false, misleading or deceptive is the claim of uniqueness of the "reserve cooling power" feature of its air conditioners. This claim was one of approximately ten advertising claims made by Fedders as to which Fedders, by order of the Commission, was required, on or about October 13, 1973 to furnish support-

ing material. Fedders duly furnished such material in response to all of the other advertising claims above referred to, and none of such other claims has been challenged by the Commission.

November 6, 1973.

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER

Attorneys for Defendant,
Fedders Corporation,
Office & P. O. Address
425 Park Avenue
New York, New York 10022

By s/ SYDNEY B. WERTHEIMER
A Partner of the Firm

Answer to Further Amended Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

Respondent, as and for its answer to the complaint herein, as amended to the date hereof:

1. Admits Paragraph ONE, Paragraph TWO, Paragraph THREE, Paragraph FOUR and Paragraph FIVE.

2. As to Paragraph SIX, admits that the statement beginning with the word "RESERVE" and ending with the word "days" set forth in Paragraph SIX was contained in advertisements disseminated by respondent, and except as admitted as aforesaid, denies each and every fact alleged in Paragraph SIX.

3. As to Paragraph SEVEN, admits that by the use of the statements specifically set forth in Paragraph SIX of the complaint, respondent represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners; but avers that the aforesaid representation of uniqueness of reserve cooling power was so infrequently made and constituted so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant, and except as admitted and averred as aforesaid, denies each and every fact alleged in Paragraph SEVEN.

4. As to Paragraph EIGHT (which consists of two paragraphs, the second of which is not numbered), admits that "reserve cooling power", referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and

feature, and, except as admitted as aforesaid, denies each and every other fact alleged in Paragraph EIGHT.

5. As to Paragraphs NINE, TEN and ELEVEN, admits that by the use of the statement specifically set forth in Paragraph SIX of the complaint, respondent represented, by implication, that at the time the aforesaid statement was made respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity, further admits that at the time said statement was made respondent had no reasonable basis for such conclusion; repeats and realleges the averment set forth as part of Paragraph "3" of the within answer, and, except as admitted and averred as aforesaid, denies each and every fact alleged in Paragraphs NINE, TEN and ELEVEN, including, without limitation, those alleged in the unnumbered second paragraphs of Paragraphs TEN and ELEVEN.

6. Denies each and every fact alleged in Paragraph TWELVE and Paragraph THIRTEEN.

AS AND FOR AN AFFIRMATIVE DEFENSE

7. Respondent, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to "reserve cooling power" and has not since resumed the dissemination of any such material.

Answer to Further Amended Complaint

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

8. The relief sought by the Commission, as set forth in the form of proposed order attached to the complaint, is unjustifiably broad in its scope.

AS AND FOR MITIGATING CIRCUMSTANCES WHICH, IF THE CHARGES ALLEGED IN THE COMPLAINT ARE SUSTAINED, MUST BE CONSIDERED IN FRAMING ANY ORDER ENTERED HEREIN

9. Respondent repeats and realleges the allegations of Paragraph "8" hereof with the same force and effect as if set forth at length hereat.

10. The only advertising claim of respondent alleged herein to have been false, misleading or deceptive is the claim of uniqueness of the "reserve cooling power" feature of its air conditioners. This claim was one of approximately ten advertising claims made by respondent as to which respondent, by order of the Commission, was required, on or about October 13, 1973 to furnish supporting material. Respondent duly furnished such material in response to all of the other advertising claims above referred to, and none of such other claims has been challenged by the Commission.

December 24, 1973

WEISMAN, CELLER, SPETT, MODLIN & WERTHEIMER
Attorneys for Respondent Fedders Corporation
Office & P. O. Address
New York, New York 10022
By /s/ SYDNEY B. WERTHEIMER
A Partner of the Firm

Order Further Amending Complaint.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

At a prehearing conference held herein on November 30, 1973, the undersigned orally on the record made several amendments to the complaint (Tr. 43, 48-49, 74). Since prehearing conferences are not public unless all parties agree otherwise (Section 3.21(c) of the Rules of Practice), the record of this prehearing conference is nonpublic. It is appropriate that a formal order issue amending the complaint so that the public record will reflect the amendments to the complaint, which have heretofore been made. Accordingly,

IT IS ORDERED that the complaint herein be, and it hereby is, amended as follows:

(1) Paragraph Two: Line 3, change "Fedders air conditioners" to "Fedders room air conditioners"; lines 4 and 5, place period after "Room Air Conditioners" and delete all language enclosed in parentheses.

(2) Paragraph Five: Line 6, delete "ACL".

(3) Paragraph Six: Line 4, delete "ACL".

(4) Paragraph Seven: Line 4, substitute "room" for "home"; line 5, insert "room" after "other".

(5) Paragraph Eight: Line 3, delete "ACL"; line 4, insert "room" after "comparable".

(6) Paragraph Nine: Line 5, delete "ACL"; line 6, insert "all" after "with".

(7) Paragraph Ten: Line 3, delete "ACL"; line 4, insert "all" after "with".

Order Further Amending Complaint

(8) Paragraph Eleven: Line 3, delete "ACL", substitute "room" for "home"; line 4, insert "all" after "with".

Respondent filed an Answer To Further Amended Complaint on December 28, 1973. It is the undersigned's understanding that respondent's answer was in response to the complaint, as orally amended on the record at the prehearing conference of November 30, 1973. Respondent's amended answer therefore took into consideration the amendments to the complaint which are made hereinabove. However, in order that there be no misunderstanding, respondent is hereby given until January 21, 1974 to file any amended answer which respondent may deem necessary because of the complaint amendments made herein. Accordingly,

IT IS FURTHER ORDERED that respondent be, and it hereby is, given until January 21, 1974 to file a further amended answer if desired.

January 10, 1974

s/ ERNEST G. BARNES,
Administrative Law Judge.

First Stipulation of the Parties, Dated March 12, 1974.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

It is stipulated by and between the parties, for the purpose of any and all proceedings in the above matter commenced pursuant to Rule 3.24 that the term "reserve cooling power" shall refer to the description of that term stated in paragraphs 5 and 8 through 11 of the Answer to Further Amended Complaint.

Dated: March 12, 1974

Heidi P. Sanchez
Paul G. Foldes
Complaint Counsel

Sydney B. Wertheimer,
Counsel for Respondent
Fedders Corporation

Second Stipulation of the Parties, Dated March 12, 1974 (without Exhibits A and B).

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

It is stipulated herein that the following information is a fair and accurate description of the extent of dissemination of Fedders room air-conditioner advertising in four sample areas over a two-year period.

1. Fedders' total advertising expenditures for each year in each sample area for Fedders air-conditioners of all types, were approximately as follows:

	1969-1970	1970-1971
Florida	$176,000	$245,000
Washington, D. C.	$ 35,000	$ 24,000
Philadelphia	$180,000	$118,000
New York	$860,000	$846,000

2. Fedders' total advertising expenditures for each year in each sample area for cooperative newspaper advertising of Fedders room air-conditioners were:

	1969-1970	1970-1971
Florida	$ 90,036.04	$ 77,857.76
Washington, D. C.	$ 28,760.87	$ 6,717.95
Philadelphia	$ 99,810.15	$ 44,388.59
New York	$247,403.62	$142,313.53

3. The total number of insertions of cooperative newspaper ads in each sample area were:

	1969-1970	1970-1971
Florida	1229	920
Washington, D. C.	163	85
Philadelphia	985	309
New York	1997	1202

Second Stipulation of the Parties, Dated March 12, 1974 (without Exhibits A and B)

4. The total number of such ads in each area claiming reserve cooling power was:

	1969-1970	1970-1971
Florida	252	111
Washington, D. C.	73	25
Philadelphia	291	132
New York	1487	738

5. The following figures represent Fedders' total expenditures for the ads listed in "4" above.

	1969-1970	1970-1971
Florida	$ 29,002.72	$15,067.38
Washington, D. C.	$ 10,987.70	$ 2,236.24
Philadelphia	$ 29,940.69	$17,409.14
New York	$129,131.33	$48,266.75

6. Of the ads listed in "4" above, the following numbers claim uniqueness to Fedders of reserve cooling power:

	1969-1970	1970-1971
Florida	37	35
Washington, D. C.	9	8
Philadelphia	33	9
New York	33	9

7. Fedders' expenditures for the aforesaid ads claiming uniqueness to Fedders of reserve cooling power were:

	1969-1970	1970-1971
Florida	$2,899.38	$5,946.05
Washington, D. C.	$ 826.91	$ 371.93
Philadelphia	$4,876.74	$ 896.74
New York	$1,750.06	$ 701.90

Second Stipulation of the Parties, Dated March 12, 1974 (without Exhibits A and B)

8. Attachment A hereto is a representative sample of five advertisements in which non-unique reserve cooling power claims were made.

9. The parties have been unable to agree to a representative sample of advertisements claiming uniqueness to Fedders of reserve cooling power. Therefore, Attachment B hereto contains one copy of each such advertisement, along with listings of numbers of insertions and identification of each newspaper in which such advertisements appeared.

Dated: March 12, 1974

Heidi P. Sanchez
Paul G. Foldes
Complaint Counsel

Sydney B. Wertheimer,
Counsel for Respondent
Fedders Corporation

Stipulation of the Parties, Dated April 10, 1974.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

It is stipulated by and between the parties, for the purpose of any and all proceedings in the above matter that the term "reserve cooling power" shall refer to the description of that term stated in paragraphs 5 and 8 through 11 of the Answer to Further Amended Complaint.

Dated: April 10, 1974

Heidi P. Sanchez
Paul G. Foldes
Complaint Counsel

Sydney B. Wertheimer,
Counsel for Respondent
Fedders Corporation

Order Incorporating Into the Record Stipulation of the Parties.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

IT IS HEREBY ORDERED that the attached Stipulation Of The Parties, dated April 19, 1974, duly signed by counsel for respondent and complaint counsel, is incorporated into the record of this proceeding.

April 24, 1974

ERNEST G. BARNES,
Administrative Law Judge.

Stipulation of the Parties, Dated April 19, 1974.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

It is hereby stipulated, by and between the parties, as follows:

1. For the purpose of any and all proceedings in the above matter, the term "reserve cooling power", shall be deemed to mean "ability to function satisfactorily under conditions of extreme heat and humidity".

2. The foregoing paragraph "1" of this Stipulation shall be deemed to supersede all prior stipulations herein with respect to the meaning of the words "reserve cooling power", which prior stipulations shall be deemed withdrawn and of no further force or effect.

3. The words "such ads" appearing in Paragraph 4 of the "Second Stipulation of the Parties" herein, dated March 12, 1974, shall be deemed to mean the cooperative newspaper ads referred to in the preceding Paragraphs "2" and "3" of that stipulation. During the period covered by that stipulation, respondent's expenditures for advertising which claimed "reserve cooling power" were, with insignificant exceptions (the cost of certain store display cards and the imprints on certain factory cartons) confined to the aforesaid co-operative ads.

Dated: April 19, 1974

Heidi P. Sanchez
Paul G. Foldes
Complaint Counsel

Weisman, Celler, Spett, Modlin & Wertheimer
Counsel for Respondent
Fedders Corporation

By S/ Sydney B. Wetheimer,
a partner of the firm

Initial Decision, Dated July 15, 1974.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

[SAME TITLE.]

Initial Decision

By Ernest G. Barnes, Administrative Law Judge.

Heidi P. Sanchez, Esquire,
Paul G. Foldes, Esquire
for the Commission.

Sydney B. Wertheimer, Esquire,
Weisman, Celler, Spett, Modlin &
Wertheimer,
New York, N. Y.,
Attorney for Respondent.

Preliminary Statement

Respondent Fedders Corporation, a corporation, is charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint issued by the Commission on June 11, 1973, alleges that respondent, in connection with the advertising, offering for sale, sale and distribution of its room air conditioners to purchasers thereof, has represented, directly or by implication, through statements and representations in advertisements placed in newspapers of interstate circulation, that "reserve cooling power" (hereinafter sometimes referred to as "RCP") is a unique feature of its room air conditioners, not found in other room air conditioners. However, in truth and in fact, the complaint alleges, RCP, referring to an increased cool-

ing capacity at high loading conditions, is not a unique feature of Fedders room air conditioners, but that, in fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

The complaint further alleges that respondent has also represented that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use. In truth and in fact, the complaint alleges, at the time the said statements and representations were made, respondent had no reasonable basis for such statements and representations.

The complaint also alleges that by and through the use of the aforesaid statements and representations in respect to RCP, respondent has represented, directly or by implication, that the Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, the complaint alleges, respondent had no reasonable basis from which to conclude that such was the fact.

In brief, the complaint alleges that respondent has (1) made a uniqueness claim for its room air conditioners when such is not a fact, (2) has represented that it had a reasonable basis for making a uniqueness claim for its room air conditioners when it had no reasonable basis for making such a claim, and (3) has represented that its room air conditioners, when compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary con-

ditions of use when it had no reasonable basis from which to conclude that such was the fact.

The above practices are alleged to have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of said products by reason of such erroneous and mistaken belief. The said practices are alleged to be false, misleading and deceptive, and constitute unfair methods of competition and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's Answer, filed August 14, 1973, generally admitted the practices alleged in the complaint, but denied that such conduct was unlawful. Respondent also interposed an affirmative defense, asserting that respondent, "in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to 'reserve cooling power' and has not since resumed the dissemination of any such material." Respondent's Answer also alleges "as and for mitigating circumstances . . . in framing any order" that its claim as to the uniqueness of the RCP feature of its room air conditioners is the only advertising claim of respondent alleged in the complaint to be false, misleading or deceptive, and was one of approximatley ten advertising claims made by respondent as to which it was required, by Commission Order of October 13, 1971, to furnish supporting material. Respondent's Answer asserts that it "duly furnished such material in response to all the other advertising claims above referred to, and none of such other claims has been challenged by the Commission."

Thereafter, on August 17, 1973, complaint counsel filed a Motion To Strike Affirmative Defenses on the grounds that they are without merit, do not constitute an affirmative defense, and are appropriately denials. On August 24, 1973, Motion Of Complaint Counsel For Summary Decision was filed.

At a prehearing conference held on August 27, 1973, it was agreed that complaint counsel would file a motion to amend the complaint, and on that date Motion Of Complaint Counsel To Amend Complaint And To Amend Motion For Summary Decision was filed. Thereafter, on September 6, 1973, the undersigned issued an order granting an extension of time until September 21, 1973 for respondent to file an answer to the amended complaint, which time to answer was subsequently extended until November 12, 1973.

At a further prehearing conference held on November 30, 1973, respondent's Answer To Amended Complaint filed on November 12, 1973, was discussed. In its Answer, respondent generally admitted the factual allegations of the complaint (see PHC Tr. 56-60), but denied those paragraphs which allege the respondent's conduct to be unlawful. At the said prehearing conference, the complaint was further amended on the record by the undersigned as follows (PHC Tr. 74):

> "I think the two major points were that the complaint is concerned with all Fedders room air conditioners, and is concerned with all advertisements which made the claim that reserve cooling power was unique, and in paragraphs 9 through 12, we are reading into the complaint, 'compared with all other room air conditioners.' Those are the amendments, and I think making them on the record here is sufficient."

Respondent, in response to the amendments made orally at the prehearing conference, filed an Answer To Further Amended Complaint on December 28, 1973. So that the public record would reflect these amendments to the complaint made at the prehearing conference, an Order Further Amending Complaint was issued by the undersigned on January 10, 1974. Respondent was given until January 21, 1974 to further amend its Answer, if necessary. No further answer was filed.

The First Stipulation Of The Parties was filed on March 19, 1974. This Stipulation provides that the term "reserve cooling power" shall refer to the description of that term which is stated in Paragraphs 5 and 8 through 11 of respondent's Answer To Further Amended Complaint, complaint counsel thereby in effect adopting respondent's definition of RCP in lieu of the definition of that term set forth in the complaint. The Second Stipulation Of The Parties, also filed on March 19, 1974, is an agreement that the information contained therein is a fair and accurate description of the extent of dissemination of Fedders room air-conditioner advertising in four sample areas over a two-year period.

A further prehearing conference scheduled for March 27, 1974 was cancelled and rescheduled for March 29, 1974 because of the illness of counsel for respondent. Due to the continued illness of counsel for respondent, the prehearing conference scheduled for March 29, 1974 was cancelled, and a formal hearing was scheduled by the undersigned for April 16, 1974.

At the formal hearing held on April 16, 1974, no witnesses were called; respondent's exhibits 1 A-Z-55, 2 A-B, and Joint Exhibit 1 A-I were received in evidence; complaint counsel's Motion To Strike Affirmative Defenses and Motion For Summary Decision were denied on the record; the record was closed for the reception of evidence; and, upon request of counsel for respondent, the

filing of simultaneous proposed findings was postponed from May 16, 1974 to May 30, 1974, and the filing of replies thereto postponed from May 30, 1974 to June 10, 1974 (Tr. 99-101). Respondent's time in which to submit a reply was subsequently extended to June 12, 1974.

A Stipulation Of The Parties, dated April 10, 1974, referring to the term "reserve cooling power", was filed on April 13, 1974. On April 24, 1974, an Order Incorporating Into The Record Stipulation Of The Parties, dated April 19, 1974, was issued by the undersigned. By this Stipulation, the parties accepted respondent's definition of "reserve cooling power" for all purposes of this proceeding.

The parties have submitted proposed findings, supporting memoranda, and proposed orders. Respondent has also filed a reply brief. This proceeding is therefore before the undersigned based upon the complaint, as amended, the answers filed by respondent, the stipulations of the parties, the joint exhibit of the parties, the proposed findings and memoranda submitted by the parties, and respondent's reply brief. No witnesses were called to testify, and the exhibits of record are by stipulation. Thus, the basic facts herein are undisputed.

The submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and include references to the principal supporting evidence in the record. Such references are intended to serve as convenient guides, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CPF —Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

CM —Memorandum In Support Of The Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

RAFAC —Respondent's Answer To Further Amended Complaint.

RPF —Respondent's Proposed Findings of Fact And Conclusions of Law.

RB —Respondent's Brief To The Administrative Law Judge.

RO —Proposed Order submitted by Respondent.

RX —Respondent's Exhibits.

Jt. Stip. —Joint stipulation submitted by the parties. (The abbreviation will be followed by the number of the stipulation and the page number upon which the evidence being cited appears.)

Jt. Ex. —Joint Exhibit of the parties.

PHC Tr. —Transcript of the prehearing conferences, followed by the page number being referenced.

Tr. —Transcript of the formal hearing, followed by the page number being referenced.

Initial Decision, Dated July 15, 1974

Findings of Fact

Identity And Business of Respondent

1. Respondent Fedders Corporation, hereinafter sometimes referred to as "Fedders", is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Edison, New Jersey (Admitted, RAFAC, Par. 1).

2. Respondent Fedders is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders room air conditioners (Admitted, RAFAC, Par. 1).

3. In the course and conduct of its aforesaid business, respondent Fedders now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Fedders therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, RAFAC, Par. 1).

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent (Admitted, RAFAC, Par. 1).

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its

said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of its room air conditioners, including but not limited to, advertisements printed in newspapers located in various states of the United States and in the District of Columbia, which newspapers are disseminated across state lines (Admitted, RAFAC, Par. 1).

The Challenged Advertisements

6. Pursuant to a resolution of the Federal Trade Commission dated June 9, 1971, and amended July 7, 1971, entitled "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation", 36 Fed. Reg. 12,058 (June 9, 1971), as amended, 36 Fed. Reg. 14,680 (July 7, 1971) (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 1, Appendix B, p. 1), on September 30, 1971, the Commission ordered respondent Fedders to file a Special Report on specific advertising claims. One of the advertising claims for which the Commission requested documentation and other substantiation by Special Report was:

> "RESERVE Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days."

The information demanded was:

> "All documentation and other substantiation for the claim that only the Fedders room air conditioner has extra cooling power that assures cooling on extra hot, extra humid days." (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 4.)

The specific advertisement questioned by the Commission's Special Report appeared in *The Monroe Morning World*, Monroe, Louisiana, June 10, 1971 (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 3).

7. Respondent filed its response to the Commission's Special Report on December 22, 1971. In its response, Fedders admitted the lack of substantiation for the claim that RCP was unique to Fedders. Respondent stated:

> "As to claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate." (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3.)

8. The advertisement set forth in the Commission's Special Report was incorporated in Paragraph Six of the complaint herein and was alleged in Paragraphs Seven and Eight of the complaint to be a uniqueness claim for Fedders room air conditioners, which is false and deceptive. Respondent has admitted that this advertisement represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners. Respondent further admitted that RCP, referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and feature (RAFAC, pp. 1-2).

The complaint in Paragraph Eight alleges that RCP refers to "an increased cooling capacity at high loading conditions". The parties have stipulated that RCP refers to the "ability to function satisfactorily under conditions of extreme heat and humidity" (First Stipulation Of The Parties; RAFAC, p. 2; Stipulation Of The

Parties dated April 19, 1974). These meanings are essentially equivalent and any distinction between the two definitions is without significance in this proceeding.

9. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners, not found in other room air conditioners (Admitted, RAFAC, p. 1). In truth and in fact, RCP, referring to an ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by some other companies function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, p. 2). Therefore the statements and representations that RCP is a unique feature of Fedders room air conditioners is false, misleading and deceptive.

10. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis to support the representation that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

12. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

Respondent's Defenses

13. In its answers filed herein, including its Answer To Further Amended Complaint, respondent, as and for an affirmative defense, alleges that it, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to RCP and has not since resumed the dissemination of any such material. Respondent further alleged, as and for mitigating circumstances if the allegations in the complaint are sustained, that the advertising claim alleged in the complaint to be false, misleading or deceptive is only one of approximately ten advertising claims made by respondent as to which it was required by the Com-

mission to furnish supporting material. Respondent furnished such material in respect to the other advertising claims in response to the Commission's Order, and none of the other claims have been challenged by the Commission (RAFAC, pp. 3-4). Respondent further affirmatively averred in its Answer To Further Amended Complaint that the challenged statements and representations of uniqueness of RCP were so infrequently made and consituated so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant (RAFAC, pp. 1-2).

Respondent's Expenditures For RCP Advertisements

14. In view of respondent's contentions concerning the insubstantiality of advertisements claiming uniqueness for RCP, the Administrative Law Judge suggested there should be submitted for the record the total advertising expenditures, the total number of advertisements which utilized the term "reserve cooling power", the expenditures for those advertisements, the total number of advertisements which utilized a claim of uniqueness for "reserve cooling power", the total expenditures for those advertisements, as well as sample advertisements of both types. It was further suggested by the Administrative Law Judge that such information could be based on a sample area (PHC, Tr. 70).

15. The sample areas agreed upon by the parties for the above purposes are as follows:

(1) *The Florida Area:*

This area, serviced during the years involved by Cain & Bultman, as distributor, comprised the entire State

of Florida (except the extreme northwest portion thereof), and the eleven southeasternmost counties of the State of Georgia.

(2) *The Washington, D. C. Metropolitan Area:*

This area, serviced during the years involved by American Appliance Wholesalers, as distributor, consisted of the District of Columbia, together with thirteen Virginia counties and five Maryland counties in the surrounding area.

(3) *The Philadelphia Metropolitan Area:*

This area, serviced during the years involved by Samuel Jacobs Distributors, Inc. and its subsidiaries and affiliates, as distributors, consisted of the City of Philadelphia and nearby counties, of which twenty-one were in the State of Pennsylvania, eight in the State of New Jersey, and two in the State of Delaware.

(4) *The New York Metropolitan Area:*

This area, serviced during the years involved by L & P Electric Co., Inc. and its subsidiaries and affiliates, as distributors, consisted of New York City, Long Island, the eight southernmost counties of New York adjacent to New York City, thirteen counties in eastern and northern New Jersey, six counties in western and central Connecticut, and three counties in the southernmost part of Massachusetts (Respondent's Response To Commission's Motion For Summary Decision, Exhibit 1 of the Pochick Affidavit; Tr. 88-90).

16. The time period agreed upon for the sample areas was the two fiscal years of respondent ending August 31, 1970 and August 31, 1971, respectively (Second Stipulation Of The Parties, p. 1; RPF, p. 9).

17. The parties stipulated that Fedders' total advertising expenditures for each fiscal year in each sample area for Fedders air conditioners of all types were approximately as follows (Second Stipulation Of The Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	$176,000	$245,000
Washington, D. C.	$ 35,000	$ 24,000
Philadelphia	$180,000	$118,000
New York	$860,000	$846,000

Of the above total, the following represents total advertising expenditures for each year in each sample area for cooperative newspaper advertising of Fedders room air conditioners (Second Stipulation Of The Parties; Tr. 90):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	$ 90,036.04	$ 77,857.76
Washington, D. C.	$ 28,760.87	$ 6,717.95
Philadelphia	$ 99,810.15	$ 44,388.59
New York	$247,403.62	$142,313.53

The parties have stipulated that the total number of insertions of cooperative newspaper advertisements in each sample area were as follows (Second Stipulation Of The Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	1229	920
Washington, D. C.	163	85
Philadelphia	985	309
New York	1997	1202

Further, the parties stipulated that the following represents the total number of cooperative newspaper advertisements claiming RCP and the total expenditures for such advertisements (Second Stipulation Of The Parties; Stipulation Of The Parties dated April 19, 1974):

	Fiscal 1969-1970		Fiscal 1970-1971	
	Insertions	Expenditures	Insertions	Expenditures
Florida	252	$ 29,002.72	111	$15,067.38
Washington, D. C.	73	$ 10,987.70	25	$ 2,236.24
Philadelphia	291	$ 29,940.69	132	$17,409.14
New York	1487	$129,131.33	738	$48,266.75

The parties have stipulated that, of the above number of cooperative newspaper advertisements, the following number claimed uniqueness to Fedders of RCP followed by the expenditure for such advertisements:

	Fiscal 1969-1970		Fiscal 1970-1971	
	Insertions	Expenditures	Insertions	Expenditures
Florida	37	$2,899.38	35	$5,946.05
Washington, D. C.	9	$ 826.91	8	$ 371.93
Philadelphia	33	$4,876.74	9	$ 896.74
New York	33	$1,750.06	9	$ 701.90

18. On the basis of the above stipulated figures, respondent's expenditures for cooperative advertisements claiming uniqueness for RCP constitute the following

ratio to total advertising expenditures and to total cooperative advertising expenditures:

	Total 2-yr. Expenditures	Total 2-yr. Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Advertising Expenditures
Florida	$ 421,000	$ 8,845.43	2.1 %
Washington, D. C.	59,000	1,198.84	2.03 %
Philadelphia	298,000	5,773.48	1.94 %
New York	1,706,000	2,451.96	.143%
	$2,484,000	$18,269.71	.736%

	Total 2-yr. Cooperative Advertising Expenditures	Total 2-yr. Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Cooperative Advertising Expenditures
Florida	$167,893.80	$ 8,845.43	5.27%
Washington, D. C.	35,478.82	1,198.84	3.38%
Philadelphia	144,198.74	5,773.48	4.04%
New York	389,717.15	2,451.96	.63%
	$737,288.51	$18,269.71	2.47%

19. On the basis of the above stipulated figures, respondent's advertisements claiming uniqueness for reserve cooling power and advertisements not claiming unique-

ness for reserve cooling power, and the expenditures therefor, constitute the following ratio to the total number of cooperative advertisements utilized by respondent and the following ratio for the expenditures for such advertisements:

	Total Number Cooperative Advertisements 1969-1971	Total Number Cooperative Advertisements 1969-1971 Claiming Reserve Cooling Power	Total Number Cooperative Advertisements Claiming Uniqueness For Reserve Cooling Power
Florida	2149	363	72
Washington, D. C.	248	98	17
Philadelphia	1294	423	42
New York	3199	2225	42
Totals	6890	3109	173

Ratio Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971

All Areas 5.56%

Total Expenditures For Advertisements Claiming Reserve Cooling Power 1969-1971	Total Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power 1969-1971

Florida	$ 44,070.10	$ 8,845.43
Washington, D. C.	13,223.94	1,198.84
Philadelphia	47,349.83	5,773.48
New York	177,398.08	2,451.96
	$282,041.95	$18,269.71

Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971

All Areas 7.8%

20. In the Florida subarea, the majority of the advertisements with unique RCP claims were in newspapers with circulations of less than 50,000. However, there were several advertisements placed in newspapers with daily circulation figures in excess of 170,000. In the Washington, D. C. subarea, most of such insertions were in small publications, none with a circulation of over 30,000 and most under 12,000. In the Philadelphia subarea, roughly one-half of the insertions were in small town or small city publications, with circulations of under 100,000. Several advertisements appeared in the *Philadelphia Inquirer* with a daily circulation of over 450,000. In the New York City subarea, all of the insertions were in small town or small city newspapers, the largest with a circulation of 66,000. Examination of the texts of these advertisements discloses that the unique RCP claim was featured in only a minority of the advertisements (RX 1).

21. The parties hereto have further stipulated that respondent's expenditures for advertising which claimed "reserve cooling power" were, with insignificant excep-

tions (the cost of certain store display cards and the imprints on certain factory cartons), confined to the aforesaid cooperative advertisements (Stipulation Of The Parties dated April 19, 1974.

Respondent's Advertisements Not Claiming Uniqueness For Reserve Cooling Power

22. Complaint counsel contend that Fedders' advertisements, referring to RCP without claiming uniqueness, suggested the superiority of the feature with language similar to that used in the uniqueness claims. Samples of advertisemets selected by complaint counsel and respondent as representative of such advertisements are contained in the record (Second Stipulation Of The Parties, Attachment A). These advertisements, while not claiming uniqueness for "reserve cooling power", state the following with respect to "reserve cooling power":

> "RESERVE COOLING POWER . . . it's Fedders engineering 'extra' which gives maximum cooling even when sunload reaches 115° . . . and other units fail!"
>
> "Fedders Sound Barrier models—as close to perfect as an air conditioner can get . . . plus Reserve Cooling Power for extra cooling strength."
>
> "You get Reserve Cooling Power for extra hot, extra humid days."
>
> "PLUS RESERVE COOLING POWER, Too (for extra hot, humid days)."
>
> "And you get: Reserve Cooling Power for extra hot, humid days; . . ."

23. Complaint counsel introduced no evidence to establish consumer perception of the representations contained in respondent's advertisements, or that there were latent

or implied messages in the statements. The Administrative Law Judge must therefore exercise his own judgment as to the representations, express or implied, contained in respondent's advertisements.

24. These advertisements, which state that "reserve cooling power" is an "extra" or is a feature designed for extra hot, humid days, or gives extra cooling strength, do not claim such feature is *unique* with Fedders room air conditioners. The only advertisement which contains a comparative claim is the first representation set forth above, which states that "reserve cooling power" is a Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115°, and other units fail. This is a comparative representation, but it does not compare Fedders room air conditioners with *all* other room air conditioners.

25. The complaint challenges as unlawful Fedders' statements and representations that "reserve cooling power" is "a unique feature of Fedders room air conditioners" when such was not a fact (Paragraphs Seven and Eight); that, by and through the uniqueness claim, Fedders represented, directly or by implication, that Fedders had a reasonable basis from which to conclude the Fedders room air conditioners had a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when compared with all other room air conditioners, when in fact Fedders had no reasonable basis for making such claim (Paragraphs Nine and Ten); and that, by and through the use of the uniqueness claim, Fedders also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when Fedders had no reasonable basis to conclude that such was the fact (Paragraph Eleven). Thus, the unlawful representa-

tions made by Fedders, which are challenged in the complaint, arise from the "uniqueness" claim for Fedders air conditioners, as set forth in Paragraph Six of the complaint.

26. A "uniqueness" claim necessarily connotes a comparison with all other air conditioners, unless the literal wording of the complaint warrants some other interpretation (see *ITT Continental Baking Company, Inc., et al.*, Docket No. 8860, Opinion Of The Commission, dated October 19, 1973, Slip Op., pp. 14-15). In fact, the Administrative Law Judge amended the complaint allegations in this matter to specifically state that the uniqueness representations of superiority were to be measured against all other room air conditioners (PHC Tr. 48-49; Order Further Amending Complaint, January 10, 1974). The Administrative Law Judge therefore concludes that the representative advertisements of Fedders room air conditioners, which utilize "reserve cooling power", but which do not claim uniqueness for this feature, are not challenged in the complaint.

27. The stipulated advertising figures in the record establish that 45.1% of respondent's cooperative advertisements utilize RCP representations, and 2.51% of respondent's cooperative advertisements claim uniqueness for RCP. Of all advertisements claiming RCP, 5.56% thereof claim uniqueness. As far as expenditures are concerned, 2.47% of total cooperative advertising expenditures were for advertisements claiming RCP. Of expenditures for advertisements claiming RCP, 7.8% thereof was expended for advertisements claiming uniqueness for RCP. In view of the small percentage of advertisements claiming uniqueness for RCP and the small percentage of expenditures for advertisements claiming uniqueness for RCP in relation to respondent's total advertising program involving RCP claims, the Administrative Law Judge concludes, in the absence of any evidence pre-

sented by either party bearing on this issue, that there was no carry-over effect on consumers, from advertisements claiming uniqueness for RCP to advertisements merely claiming RCP. The record is silent as to the type of in-store display cards utilized, or the extent of their use (see Finding 21).

Respondent's Discontinuance Defense

28. When Fedders responded to the Commission's Special Report on December 22, 1971, it stated as follows:

> "As to the claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate" (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3; Jt. Ex. 1).

Also, on December 22, 1971, Fedders sent a bulletin to all of its distributors advising that "Old powerful selling friends like 'Reserve Cooling Power', 'multi-room cooling', 'cools three rooms, even a small home', 'installs in minutes', 'germicidal filter' are no longer." Distributors were further advised that they are not to use any of the advertisements provided in 1971 and earlier years. Distributors are requested to advise dealers that advertisements must not make any claims for the Fedders product that are not made in Fedders' supplied 1972 materials (Jt. Ex. 1 H).

This bulletin does not acknowledge that "reserve cooling power" claims were untrue, or were capable of misleading customers, or could not be proved or substantiated. Instead, the bulletin states that Fedders is "eliminating every phrase that could possibly be questioned by the FTC" (Jt. Ex. 1 H). The bulletin also indicates that "reserve cooling power", along with the other advertis-

ing representations, are being eliminated "not that they are not provable or that they are misleading, but simply because the explanation and qualifications that would have to be included in each ad would take up too much space" (Jt. Ex. 1 H).

29. An affidavit by Harold Boxer, Director of Merchandising of Fedders, which is attached to Respondent's Response To Commission's Motion For Summary Decision, stated that the Fedders Advertising Department in or about 1964 or 1965 coined the phrase "reserve cooling power" as an expression of the operating characteristics under extreme temperatures of Fedders room air conditioners, and the words had been featured in Fedders' advertising through 1971.

30. In an affidavit attached to Respondent's Response To Commission's Motion For Summary Decision, Paul C. Anderson, Advertising Manager for Room air Conditioners of Fedders, stated that all references to "reserve cooling power" were completely dropped from Fedders' advertising in December 1971 and that those words have not been used by Fedders in the preparation of further advertising matter.

31. Sam Muscarnera, House Counsel for Fedders, has submitted an affidavit dated April 15, 1974, which has been received into the record by stipulation of counsel for the parties (Jt. Ex. 1 C-G). Mr. Muscarnera has set forth the steps taken by Fedders in order to maintain firmer control, insofar as possible, over advertising. Mr. Muscarnera also stated that "the likelihood of Fedders' repetition of the offending practices charged is exceedingly remote" (Jt. Ex. 1 G).

32. The Commission served its Order To File Special Report calling for advertising substantiation on respondent on October 15, 1971; notice of a proposed adjudicative

hearing was served on respondent on October 12, 1972; and the formal complaint herein issued on June 11, 1973 (RPF, p. 7).

33. There is no evidence in the record indicating that any claims for "reserve cooling power" have been disseminated since December 22, 1971 (Jt. Ex. 1 A-E).

34. "Climatrol" brand room air conditioners are manufactured by Fedders, and marketed through a wholly-owned subsidiary known as Mueller Climatrol Corp. An advertisement for "Climatrol" central air conditioners appeared in the March 4, 1974 issue of *Newsweek* magazine which claimed, among other things, that the rotary compressor of the unit was "exclusive". This advertisement was called to Fedders' attention by complaint counsel, who questioned the use of the word "exclusive" by Climatrol in light of the fact that similar products are manufactured and marketed by Fedders under the "Fedders" brand. Fedders has maintained, in an affidavit submitted by Mr. Muscarnera, that Mueller Climatrol Corp., in contrast to the great majority of Fedders' subsidiaries and divisions, is semiautonomous, and its sales and advertising staff operate independently of the advertising organization and personnel of Fedders. Consequently, up to the time the above advertisement appeared, Mueller Climatrol Corp. had not cleared its advertising through Fedders, as had other Fedders divisions. Mueller Climatrol had previously been advised by Fedders to avoid the use of the word "exclusive" in any context whenever possible, and, accordingly, as early as October 15, 1973, had substituted the word "exciting" for the word "exclusive" as applied to the rotary compressor (Jt. Ex. 1 F).

35. While the exclusivity of the rotary compressor in the residential central air conditioning field is not challenged in this proceeding, the use of the word "exclusive" as to "Climatrol" brand units could, from a technical

standpoint, create confusion in consumers' minds unless accompanied by appropriate explanatory material (Jt. Ex. 1 F). This incident is of significance to this proceeding in view of respondent's discontinuance argument, since it clearly indicates that Fedders had not taken appropriate steps, at least as of October 1973, to prevent the promulgation of false or deceptive advertisements by all its subsidiaries and divisions because Climatrol advertisements were not cleared through Fedders as of that date. In fact, it appears that as late as March 1974, Fedders' divisions and subsidiaries were utilizing advertisements containing representations which had not been reviewed and cleared by responsible Fedders officials.

Conclusions.

The complaint, as amended by the Administrative Law Judge, charges that respondent represented that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners, and that, in fact, respondent had no such reasonable basis as to Fedders room air conditioners. The complaint, as amended, also charges respondent with representing that it had a reasonable basis for the claim that reserve cooling power is unique with Fedders room air conditioners and that, in fact, repsondent had no such reasonable basis for such representation. The amended complaint further charges that by use of the uniqueness claim, respondent represented that its room air conditioners operated in a way superior to the functioning of other room air conditioners, and that such is not a fact.

In its Answer To Amended Complaint, respondent admitted making these representations, that it had no reasonable basis therefor, and that there was no basis in fact for the representations. Therefore, all allegations of unlawful conduct charged in the complaint have been admitted. Under the doctrine pronounced by the Com-

mission in *Pfizer,* " * * * it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim." *Pfizer, Inc.,* Docket 8819, Opinion of the Commission, 81 F. T. C. 23, 62 (1972).

Thus, the only issues remaining after the pleadings are whether these admittedly unlawful acts and practices have the tendency and capacity to mislead a substantial portion of the purchasing public; whether discontinuance is a defense to an order in this proceeding; and whether respondent's conduct was sufficiently serious to support an order.*

Discontinuance

It is undisputed that claims relating to reserve cooling power have been discontinued. The circumstances surrounding discontinuance, set forth hereinafter, are likewise undisputed.

The advertising campaign for reserve cooling power was of lengthy duration, beginning at least in the mid-sixties and continuing until late 1971, the date of the discontinuance. The extended usage of the claims is a strong indication of the importance of said claims to the advertising strategy followed by respondent. Respondent has referred to the reserve cooling power advertising claims as an "[O]ld powerful selling friend(s)" (Jt. Ex. 1 H).

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*In its reply brief respondent states: "The central issues are two: first, whether under all the circumstances here involved, the complaint should be dismissed by reason of Respondent's discontinuance of the offending practice, and second, if the complaint is not dismissed, whether Complaint Counsel's Proposed Order * * * is impermissibly broad" (Reply Brief, pp. 1-2).

The discontinuance of reserve cooling power claims in late 1971 cannot be considered to have been a voluntary action. The record establishes that the discontinuance occurred as a direct result of respondent's awareness of the Commission's investigation of its advertising. The record clearly demonstrates that it was only during the preparation of the response to the Commission's Special Report that respondent made the decision to discontinue the uniqueness claim, as well as the more general claim regarding reserve cooling power. It was not until the same date that respondent filed its response to the Special Report with the Commission that it warned its distributors to stop making any reserve cooling power claims. "In other words respondent stopped violating the law when it learned that the law's hand was already on its shoulder, * * *." *Coro, Inc., et al.,* Docket 8346, Opinion of the Commission, 63 F. T. C. 1164, 1201 (1963).

" 'That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument.' " *Giant Food, Inc.,* Docket 7773, Opinion of the Commission, 61 F. T. C. 326, 356 (1962), citing *Marlene's Inc. v. F. T. C.,* 216 F. 2d 556, 559 (7th Cir. 1954). Further, the courts have consistently recognized the propriety of a cease and desist order when, as in this case, the discontinuance was not entirely voluntary. *Galter v. F. T. C.,* 186 F. 2d 810, 812, 813 (7th Cir. 1951), cert. den. 342 U. S. 818 (1951); *Eugene Dietzgen Co. v. F. T. C.,* 142 F. 2d 321, 330 (7th Cir. 1944), *cert. den.* 323 U. S. 730 (1944). Thus, the fact that respondent's discontinuance is directly attributable to the Commission's investigation must be given substantial weight when judging the merits of respondent's discontinuance.

The First Circuit in *Coro, Inc., v. F. T. C.,* 338 F. 2d 149, 153 (1964), *cert. den.* 380 U. S. 954 (1965), in upholding a Commission cease and desist order based on a

showing of unfair and deceptive practices used in only one percent of the business solicited by a respondent which had no prior record of violations of the Federal Trade Commission Act, found the following circumstances which it said negated the respondent's defense of discontinuance:

> "But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry."

The facts in the present case closely resemble the circumstances found by the Court in *Coro*. Respondent continues to sell air conditioners, continues to advertise air conditioners, and could resume making deceptive advertising claims at any time in the future. The only special circumstance demonstrated by respondent is affidavits submitted by corporate officials.

The steps taken by respondent's officials to insure that future advertising violations will be avoided appear less than satisfactory. The record shows that one of the respondent's subsidiaries has as recently as March, 1974, long after the complaint herein had issued, widely disseminated a questionable uniqueness claim for an important performance characteristic of an air conditioner. In a joint exhibit, Mr. Muscarnera, respondent's in-house counsel, stated in an affidavit that a recent advertisement in a national news weekly magazine for a central air conditioner manufactured by Fedders, but sold under the Climatrol label, made a claim of exclusivity for Climatrol's rotary compressor, when central air conditioners

sold under the Fedders label also have the exact same feature. Most importantly, Mr. Muscarnera admitted that he was unaware of the dissemination of this particular advertisement until it was recently brought to his attention by complaint counsel.

The philosophy on which the Commission's Ad Substantiation Program is based, is that corporations must strive to exercise a higher level of responsibility than previously, by *assuring* themselves that *before* they disseminate an advertising claim, sufficient substantiation exists to constitute a reasonable basis as to the validity of such claim. *Pfizer, Inc., supra.* The Administrative Law Judge is definitely in accord with the holding in *Pfizer.* Clearly, respondent's admission of dissemination of a performance claim for its room air conditioners over a period of several years without having a reasonable basis therefor demonstrates a deficiency in the maintenance of the required standard of corporate responsibility in the past. Moreover, despite respondent's assurances of future discontinuance of this type of objectionable conduct, and recitation of precautions taken to prevent such future recurrences, the March, 1974 Climatrol advertisement suggests that respondent's officers have failed to exercise adequate precautions to prevent respondent's unsubstantiated advertising claims.

Therefore, the Administrative Law Judge is of the opinion that a cease and desist order is both necessary and proper in this proceeding. Without an order, the public has no definite assurance that the unlawful practices will not be resumed at some time in the future. *Fairyfoot Products Co. v. F. T. C.,* 80 F. 2d 684, 686-687 (7th Cir. 1935).

Respondent's Defense Based on Insubstantiality

Respondent argues that the impact of the offending advertising claims upon the purchasing public could not

have been substantial, in light of the limited circulation of the media in which the advertisements containing such claims were placed, the relatively few insertions involved, the small expenditures involved and their insignificance in relation to respondent's total advertising effort, and the fact that in most instances such claims were not featured in the advertisements in which they appeared, but were included merely as one of a considerable number of other claims (RB, p. 8).

In the present case, respondent considered the claims for reserve cooling power as a significant selling device—an old powerful selling friend (Jt. Ex. 1 H). The representation was utilized for several years, and was discontinued only when questioned by the Commission. The advertisement represented that *only* Fedders gives assurance of cooling on extra hot, extra humid days. Such a representation is the *raison d'etre* for an air conditioning unit—it is an extremely material representation. Thus, there can be no question that the challenged claims for this major feature were material.

Even when a claim is material, the Commission has at times chosen not to issue an order when it has found the violation to be so minor as to be *de minimis*. The doctrine is usually applied, however, where it appears the violation was an isolated, unintentional act, unlike the offender's usual practices. The Commission has been reluctant to invoke the *de minimis* doctrine, particularly in the case of advertising violations, and has in the past held one or a few advertisements to be sufficiently serious to justify the issuance of an order in the public interest (see *F. T. C. v. Colgate-Palmolive Co., et al.*, 380 U. S. 374, 395 (1965) (3 advertisements); *Gimbel Bros., Inc., v. F. T. C.*, 116 F. 2d 578, 579 (2d Cir. 1941) (advertisements published twice); *Gimbel Bros.*, 60 F. T. C. 359 (1962) (one advertisement), *appeal dismissed* 7 S. & D. 549 (3d Cir. 1962); and *Baldwin Bracelet Corp., et al.*,

61 M. T. C. 1345, 1363 (1962), *aff'd* 325 F. 2d 1012 (D. C. Cir. 1963), *cert. den.* 377 U. S. 923 (1964).

As the following figures show, this case deals not with an isolated incident, but with many different advertisements, each containing a deceptive representation, inserted in many newspapers, presumably on a national scale. Considering only the sample areas over the designated period of two years, there were the following numbers of insertions of advertisements claiming uniqueness of reserve cooling power: 72 insertions in Florida, 17 in Washington, D. C., 42 in Philadelphia, and 42 in New York, for a total of 173 insertions.

Respondent emphasizes that only ¾ of 1% of its total advertising expenditures in the sample areas was spent on reserve cooling power uniqueness claims, and of that total the expenditures for cooperative advertising bearing uniqueness claims in relation to total cooperative advertising expenditures had a ratio of only 2½%; and that only $18,269.00 was spent on cooperative advertising utilizing uniqueness claims during the two-year period in the sample areas (RPF, pp. 8-16). Respondent would thus conclude that the offending claims did not have the tendency and capacity to mislead a substantial portion of the purchasing public (RPF, p. 16).

The record does not show what proportion of national sales or advertising the sample areas constitute. Therefore, an accurate projection of the total number of insertions of offending advertisements is impossible. The record does show that reserve cooling power claims were run over a period of several years, although the record does not show what form the advertisements took or whether uniqueness claims were utilized. However, if the two-year period examined were typical of what occurred on a national scale, which the sampling device presupposes, we can safely speculate that the total numbers of deceptive uniqueness advertisements may have run well

into the thousands and expenditures therefor into the hundreds of thousands of dollars.

Respondent's argument merely establishes that the challenged advertising constituted a small portion of respondent's total advertising program; it does not establish that the false advertising claims were without impact on the public. Clearly, the violation, concerning a material claim broadly disseminated, involving hundreds, perhaps thousands of newspaper advertisements, cannot be regarded as *de minimis*. The Administrative Law Judge finds the language of the Commission in the *Baldwin Bracelet* matter particularly appropriate: "* * * we are not prepared to say that deception is all right if practiced in moderation." (61 F. T. C. 1363). Nor is deception permissible if practiced in small town newspapers of limited circulation (Reply Brief, p. 17). The Act also includes within its protection residents of small towns (see *Charles Of The Ritz Dist. Corp. v. F. T. C.*, 143 F. 2d 676, 679 (2d Cir. 1944)).

The Administrative Law Judge concludes, therefore, that respondent's dissemination of uniqueness representations for reserve cooling power, which were not in fact true and substantiated, constituted a substantial practice involving a material performance claim. Accordingly, these representations had the tendency and capacity to mislead a substantial portion of the purchasing public and are of such a magnitude as to warrant a cease and desist prohibition.

The Remedy

It is well settled that the Commission may, and should, enter an order of sufficient breadth to insure that a respondent will not engage in future violations of the law. To this end the Commission has wide discretion in fashioning an appropriate order. See *Jacob Siegel Co. v. F. T. C.*, 327 U. S. 608, 611-13 (1946); *F. T. C. v. Ruberoid*

Co., 343 U. S. 470, 473 (1952); *F. T. C. v. National Lead Co.*, 352 U. S. 419, 428-30 (1957); *F. T. C. v. Colgate-Palmolive Co.*, 380 U. S. 374, 392 (1965). Commission orders have been consistently upheld whenever the orders are reasonably related to the unlawful practices found to exist and are clear and precise so that they may be understood by those against whom they are directed. *Jacob Siegel, supra,* at 611-13; *Ruberoid, supra,* at 473; *F. T. C. v Cement Institute,* 333 U. S. 683, 726 (1948).

The Commission, within this framework, may reasonably ban the precise practice found to violate the Federal Trade Commission Act, and may enjoin "like and related" practices. *F. T. C. v. Mandel Bros., Inc.*, 359 U. S. 385, 392-393 (1959); *Niresk Industries, Inc., v. F. T. C.*, 278 F. 2d 337, 343 (7th Cir. 1960), *cert. den.* 364 U. S. 883 (1960); *Consumers Products of America, Inc., et al. v. F. T. C.*, 400 F. 2d 930, 933 (3d Cir., 1968), *cert. den.* 393 U. S. 1088 (1969). Further, a respondent "caught violating the Act must expect some fencing in." *F. T. C. v. National Lead Co., supra,* at 510. While recognizing that it would be inappropriate to narrow the scope of the order to the precise misrepresentation made (uniqueness of a single characteristic, namely, "reserve cooling power"), respondent submits that it is entirely fitting and proper for the order to be confined to unfounded claims of uniqueness of any attribute or characteristic. Respondent contends that the notice order, embracing as it does all "performance characteristics" of any Fedders air conditioners, "is completely impermissible" (RB, pp. 14-15).

The form of order served with the complaint would prohibit uniqueness claims of any kind and misrepresentations of performance characteristics of any kind. The notice order also provides for record keeping. Complaint counsel have made minor changes in their proposed form of order from the form of order served with the complaint.

The order entered by the Administrative Law Judge

herewith prohibits respondent from making any uniqueness claims. It would also prohibit the making of any representation as to a performance characteristic of any air conditioner unless, at the time of the making of the representation, respondent had a reasonable basis for such representation. The order entered herewith also requires that records of the documentation in support of performance claims be maintained for three (3) years after such claims are made and that such records be made available to the Commission upon reasonable notice. The record-keeping provision is limited to ten (10) years from the date the order becomes final. Thus, the Administrative Law Judge has basically adopted the proposed order served with the complaint and recommended by complaint counsel, with minor changes which are without substantial substance such as combining specific prohibitions into the broader prohibition.

Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity. Respondent seems to acknowledge (RB, p. 15) that the order may properly extend beyond the confines of this one misrepresentation. The Administrative Law Judge is of the opinion the order should prohibit respondent from making *any* performance claim for its air conditioners unless it possesses adequate substantiation for the claim at the time the representation is made. The Commission has recognized the propriety of orders governing all performance characteristics. *The Firestone Tire and Rubber Co.*, Docket 8818, 81 F. T. C. 398, 475 (1972), *aff'd* 481 F. 2d 246, 250 (6th Cir. 1973), *cert. den.* 42 U.S.L.W. 3362 (December 18, 1973). This provision of the order simply states explicitly the requirements already recognized by *Pfizer*: the possession of a reasonable basis for any material claim at the time the claim

is disseminated. Because this provision simply sets forth a presently-existing obligation, it imposes little additional burden upon respondent, even extending it to all air conditioners.

The record-keeping provision requires respondent to keep, and make available to the Commission, those materials which constitute substantiation for any performance claims which may be made. These are the same materials which the Commission is presently empowered to demand in Section 6(b) Orders to File Special Reports. Consequently, the record-keeping provision, also an existing duty, reasonably incorporates all air conditioners. The only requirement included in this provision not previously spelled out by the Commission is that respondent retain such substantiation materials for three years, and this specific time requirement is not burdensome.

The requirement of record retention is the best possible method of preventing the recurrence of unsubstantiated claims. The requirement imposes little additional burden upon a respondent, which must, according to Pfizer, possess the materials at the time the claim is disseminated. At the same time, the retention will expedite Commission examination of the materials as soon as it suspects an unsubstantiated claim may have been or is about to be disseminated (after reasonable notice to respondent).

The Commission, as affirmed by the Sixth Circuit Court of Appeals, recognized the usefulness of a record-retention provision in the recent case, *Firestone Tire and Rubber Co., supra,* 481 F. 2d at 250. In that case, the identical three-year retention provision as proposed herein, was ordered and affirmed.

Accordingly, the order entered herewith is believed to be both appropriate and necessary to prevent future violations of the law.

Initial Decision, Dated July 15, 1974

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the respondent and this proceeding is in the public interest.

2. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, New Jersey.

3. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including

but not limited to, advertisements printed in newspapers located in various states of the United States and in the District of Columbia, which newspapers are disseminated across state lines. Typical of the statements and representations contained in said advertisements is the following segment of the print advertisement for Fedders room air conditioners:

> "RESERVE Cooling Power—only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days."

6. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners. In truth and in fact, "reserve cooling power", referring to the ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies function satisfactorily under conditions of extreme heat and humidity. Therefore, such statements and representations were and are false, misleading and deceptive.

7. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all

other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. Therefore, the statements and representations were and are false, misleading and deceptive.

8. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact. Therefore, the statements and representations were and are false, misleading and deceptive.

9. The use by respondent of the aforesaid false, misleading and deceptive acts and practices have had, and now have, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

10. The aforesaid acts or practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U. S. C. 45).

Initial Decision, Dated July 15, 1974

Order

IT IS ORDERED that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the performance characteristics of any air conditioner including, but not limited to, air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

3. failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, inso-

far as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics (including but not limited to air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation) of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of Paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is Further Ordered that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is Further Ordered that respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or

dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

July 15, 1974

s/ ERNEST G. BARNES,
Administrative Law Judge.

Final Order, Dated January 14, 1975.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Lewis A. Engman, Chairman.
Paul Rand Dixon.
Mayo J. Thompson.
M. Elizabeth Hanford.
Stephen Nye.

[SAME TITLE.]

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying Opinion, having denied the appeal:

IT IS ORDERED that the initial decision of the administrative law judge, pages 1-30, is adopted as the Findings of Fact and Conclusions of Law of the Commission, except insofar as certain comments on pages 29-30 are inconsistent with the conclusions on pages 5-6 of the accompanying Opinion, and subject to the following changes:

P. 2, line 4, omit "that"

P. 3, line 9, word 4 "asserting"

P. 15, substitute 6.5% for 7.8%

P. 18, line 36, substitute 6.5% for 7.8%

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following order be entered:

Final Order, Dated January 14, 1975

Order

IT IS ORDERED that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners, do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material;

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by re-

spondent or by any such division or subsidiary, which claim concerns the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

IT IS FURTHER ORDERED that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

Final Order, Dated January 14, 1975

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

By the Commission.

CHARLES A. TOBIN
Secretary

Seal

Issued: January 14, 1975

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

Commissioners:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

IN THE MATTER

of

FEDDERS CORPORATION, a corporation.

Docket No. 8932

Opinion of the Commission.

By DIXON, Commissioner:

The complaint in this matter was issued on June 11, 1973, and charged respondent with dissemination of false and misleading advertisements in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). In particular the complaint alleged that respondent had represented through advertisements in newspapers of interstate circulation that (1) "reserve cooling power"[1] is a unique feature of its room air con-

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[1]Hereinafter sometimes "RCP," stipulated by the parties to mean "ability to function satisfactorily under conditions of extreme heat and humidity." (I. D. 8)

The following abbreviations are used herein:

I. D. —Initial Decision (Finding No.)
I. D. p. —Initial Decision (Page No.)
RB —Respondent's Appeal Brief (Page No.)

ditioners, not found in other room air conditioners; (2) Fedders' room air conditioners compared with all other room air conditioners have a significantly increased cooling capacity at high loading conditions under customary conditions of use; and (3) Fedders had a reasonable basis for concluding that its product compared with all other room conditioners has said increased cooling capacity. Drawing on a brief record consisting of stipulations, joint exhibits, and a few respondent's exhibits[2], the administrative law judge sustained the complaint and recommended entry of an order. On appeal respondent has taken essentially the same position as it took before the administrative law judge, conceding the falsity of, and absence of reasonable basis for, the challenged representations but raising so-called affirmative defenses of "abandonment" and "insubstantiality," and arguing in the alternative that the order should be diminished in scope. We find the affirmative defenses to be patently without merit, as did the administrative law judge, but we believe that a slight modification of the order he has proposed is appropriate.

I. *Insubstantiality*

Respondent argues that it should be absolved from any liability in this matter because the number of offending advertisements constituted only a small percentage of respondent's total advertising expenditures. Evidence submitted by respondent indicated that in four sample areas, New York, Philadelphia, Washington, D. C., and Florida, during the sample two-year period ending August 31, 1971, the number of untruthful advertisements totaled 173

[2]In describing the record in this case, the administrative law judge neglected to make reference to certain exhibits submitted by respondent separately (I. D. p. 5, third full paragraph). There is no indication, however, that the administrative law judge did not actually consider these exhibits in fashioning his decision, and in any event the Commission has fully considered said exhibits in its own review of the record.

or 5.8% of all advertisements for reserve cooling power, and expenditures on such advertisements were $18,269 or 6.5% of all expenditures for advertisements touting RCP. (I. D. 17, 18) Respondent asserts in its appeal brief that the sample area accounted for "at least 35%" of its total United States' sales and advertising expenditures for the sample period.[3] Whatever the total number of offending advertisements may have been, it is clear to us that evidence from the sample area alone was quite sufficient to destroy whatever weight might be accorded respondent's defense of insubstantiality.

The Commission has previously issued orders in cases involving no more than one or a few deceptive advertisements. [See *Gimbel Bros.*, 60 FTC 359, 368 (1962), appeal dismissed per stipulations, No. 14019 (3d Cir. Oct. 8, 1962) unreported; *Gimbel Bros., Inc., v. FTC,* 116 F. 2d 578, 579 (2d Cir. 1941).] Here, in an area apparently accounting by respondent's estimate for far less than half of all its sales, 173 separate false advertisements were disseminated over a two-year period. This was 173 more than the law allows, and far more than warrant an appeal to the discretion of the Commission to omit an order in a litigated case. The fact that these advertisements constituted only a small percentage of respondent's total advertising program is wholly irrelevant. It merely demonstrates the truism that a larger advertiser inevitably has

[3]RB 13. The administrative law judge, noting that advertisements for RCP had been run for several years prior to the sample period, concluded that the actual number of offending advertisements may have totaled in excess of 1,000. (I. D. p. 27) Respondent challenged this extrapolation, though it did agree to use a sampling procedure. The parties apparently disagree as to whether the sample may be taken as representative of Fedders' advertising during the entire period in which RCP advertisements were run, or simply as representative of Fedders' advertising throughout the country for the sample two-year period. Resolution of this disagreement is not necessary for our decision.

more opportunities than a smaller one to engage in deceptive practices. Similarly, we are entirely unimpressed with the fact that the offending advertisements appeared in non-urban newspapers with less circulation than metropolitan dailies. We are pleased to note, however, that respondent does not maintain that "deception is all right if practiced in moderation" nor that "deception is permissible if practiced in small town newspapers of limited circulation" (RB 13-14), though the learned administrative law judge may be excused for having received the contrary impression. (I. D. p. 27) In all events the magnitude of the false advertising in this case cannot constitute an affirmative defense to the allegations of the complaint, nor does it give any reason to think that an order is not required to remedy the violation.

II. *Abandonment*

Respondent further argues that it abandoned the offending practice in late 1971. It was stipulated at trial that RCP advertising was discontinued at this time, following determination by respondent, in response to an advertising substantiation order served on it by the Commission, that claims for the uniqueness of RCP could not be substantiated. The Commission has been properly parsimonious, if not totally unyielding, in its adjudicative recognition of the defense of abandonment, and courts have been reluctant to vacate Commission orders on those grounds except in the most extreme circumstances not present here, such as where a corporate respondent had exited from the relevant line of business under circumstances in which re-entry seemed improbable. *National Lead Co. v. FTC,* 227 F. 2d 825, 839 *et seq.* (7th Cir. 1955), *reversed in other respects,* 352 U. S. 419 (1957). Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense. It is undisputed that respondent did not discontinue the challenged advertising until it had received an Order to File Special Report, requesting sub-

stantiation for the false representation. The situation is in essence no different from that in *Coro, Inc.*, 63 FTC 1164 (1963), *aff'd* 338 F. 2d 149 (1st Cir. 1964), *cert. denied* 380 U. S. 954 (1965), upon which the administrative law judge relied. While it is true that the mere issuance by the Commission of an advertising substantiation order is not meant to imply that the recipient is suspected of wrongdoing, it is also clear that an order to file this special r port pursuant to Section 6(b) of the FTC Act is an investigatory tool of the Commission, just as much as a subpoena issued pursuant to Section 9 of the Act, and having received such an order Fedders' subsequent discontinuance can hardly be viewed as being borne of spontaneous recognition of the error of its ways. Respondent disseminated plainly false advertisements for at least two years, discontinuing them only upon discovering that at long last the government would be reviewing the claims. These circumstances are not such as can breed confidence that respondent may be relied upon in the future to regulate its own advertising when the government may again not be looking over its shoulder, without the encouragement of an order. And we find without merit the contention that the circumstances of discontinuance in this case should be considered an affirmative defense to an otherwise plain violation of law.[4]

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[4]It is also unclear, as the initial decision points out, to what extent respondent has actually managed to eliminate false claims of the sort challenged here from its advertising. (I. D. pp. 34-35.) It appears that in March 1974, an advertisement ran in *Newsweek* claiming "exclusivity" for a feature of respondent's "Climatrol" brand room air conditioner when in fact others of respondent's air conditioners possessed the same attribute. We do not think that this circumstance is essential to our finding that the abandonment defense must fail. It is, however, an additional ground for that conclusion, and suggests that even during the pendency of these proceedings, when respondent has had an unusual interest in avoiding repetition of false claims (to demonstrate the lack of necessity for an order) it has been unable to do so.

III. *Order*

The argument put forth most seriously by respondent concerns the scope of the order entered by the administrative law judge. Respondent objects to paragraph II of the order, which prohibits false performance claims, and to paragraph III, to the extent it requires maintenance of substantiating materials for performance claims. Respondent contends that the representation challenged in this case was not a performance claim at all, but only a uniqueness claim, and that the order should be no broader than paragraph I, which prohibits false uniqueness claims, while paragraph III should be modified to require maintenance of substantiation for uniqueness claims only.

We cannot agree that the false representations here in question dealt only with "uniqueness" and not "performance," nor do we believe that an order dealing only with uniqueness claims would be in the public interest or serve to prevent future occurrences of the sort involved here.

In claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.[5] An order addressed only to uniqueness

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[5]Consider an advertisement for air conditioners that represented them to be unique because of being painted with red, white, and green stripes. Certainly the consumer would be left thinking that the advertised air conditioner was "unique," but the Commission might be at pains to show that such a claim was material, nor can we imagine a sane advertiser spending money to make it. Uniqueness is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance, and warranty terms.

claims and not to performance claims would be inadequate to insure that the same species of misrepresentation as has here occurred will not happen again.

It remains then to consider the scope of the prohibition on false characterizations of performance. The administrative law judge and complaint counsel recommend a prohibition on misrepresentation of all performance characteristics. The performance characteristic in this case which was untruthfully and without reasonable basis represented to be unique involved air cooling capacity under conditions of extreme heat and humidity. In view of all the circumstances of this case, including the fact that only one performance characteristic was misrepresented, we believe that the order should be narrowed slightly to forbid only misrepresentations of performance characteristics of the general sort involved in the offending advertisements. An appropriate order is appended.

By the Commission.

January 14, 1975

Respondent's Exhibits 2A and 2B—Affidavit of Rosa Perla, With Attached Spread Sheet.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

IN THE MATTER

of

FEDDERS CORPORATION, a corporation.

Docket No. 8932

State of New York,
County of New York, ss:

ROSA PERLA, being duly sworn, deposes and says:

1. I am a bookkeeper working on special assignments in the office of Weisman, Celler, Spett, Modlin & Wertheimer, attorneys for the respondent herein, and, in that capacity, under the direction of Mr. Wertheimer, I prepared the attached spread sheet.

2. The basic figures as to dollar expenditures and number of ad insertions, in respect to each of the subareas included in the spread sheet for each of the years involved, were furnished to me by Mr. Wertheimer, who advised me that they had been developed during the course of discovery proceedings instituted by the Commission's staff.

Respondent's Exhibits 2A and 2B—Affidavit of Rosa Perla, With Attached Spread Sheet

These figures appear in Columns 1, 2, 3, 4A, 5A, 5D, 6A, 6E, 7A and 7E of the spread sheet.

3. The percentages which appear at the other columns of the spread sheet are based on my own calculations. I believe that they are accurate.

ROSA PERLA

Sworn to before me this
10th day of April, 1974
RUTH ASHER
Notary Public
Notary Public, State of New York
No. 31-0104690
Qualified in New York County
Commission Expires March 30, 1975

Attached Spread Sheet.

(See opposite page.) ☞

FEDDERS CORP. REVISED SPREAD SHEET

	(1)	(2)	(3)	(4)					(5)					(6)						(7)							
				PORTIONS OF COOP. NEWSP. EXPENSE AND INSERTIONS WITH NO RCP CLAIMS					PORTIONS OF COOP. NEWSP. EXPENSE AND INSERTIONS WITH RCP CLAIMS, INCLUDING BOTH, UNIQUE – NON-UNIQUE CLAIMS					PORTIONS OF COOP. NEWSP. EXPENSE AND INSERTIONS WITH NON-UNIQUE RCP CLAIMS						PORTIONS OF COOP. NEWSP. EXPENSE AND INSERTIONS WITH UNIQUE RCP CLAIMS						RATIO OF COL. 7A TO COL. 6A	RATIO OF COL. 7E TO COL. 6E
	TOTAL ADVERTISING EXPENSE	TOTAL COOP. NEWSP. ADV. EXPENSE	TOTAL COOP. NEWSP. INSERTIONS	(4A) DOLLAR EXPENSE	(4B) % OF COL. 1	(4C) % OF COL. 2	(4D) NO. OF INSERTIONS	(4E) % OF COL. 3	(5A) DOLLAR EXPENSE	(5B) % OF COL. 1	(5C) % OF COL. 2	(5D) NO. OF INSERTIONS	(5E) % OF COL. 3	(6A) DOLLAR EXPENSE	(6B) % OF COL. 1	(6C) % OF COL. 2	(6D) % OF COL. 3	(6E) NO. OF INSERTIONS	(6F) % OF COL. 3	(6G) % OF COL. 5	(7A) DOLLAR EXPENSE	(7B) % OF COL. 1	(7C) % OF COL. 2	(7D) % OF COL. 5	(7E) NO. OF INSERTIONS	(7F) % OF COL. 3	(7G) % OF COL. 5		
FLORIDA SUBAREA																													
1969-70	176,000	90,036	1,229	61,033	35%	68%	977	79%	29,003	16%	32%	252	20%	26,103	15%	29%	98	21%	17%	85%	2899	2%	3%	10%	37	3%	15%	11%	17%
1970-71	245,000	77,858	920	12,790	26%	81%	809	88%	15,067	6%	19%	111	12%	9121	4%	12%	61	7%	8%	65%	5946	2%	8%	31%	35	4%	33%	65%	46%
BOTH YEARS COMBINED	421,000	167,894	2,149	123,823	29%	74%	1,786	83%	44,070	10%	26%	363	17%	35,224	8%	21%	80	29	14%	80%	8,845	2%	5%	20%	72	3%	20%	25%	25%
WASHINGTON DC. SUBAREA																													
1969-70	35,000	28,761	163	17,773	51%	62%	90	55%	10,988	31%	38%	73	45%	10,160	29%	35%	92	44	39%	88%	827	2%	3%	5%	9	6%	12%	8%	14%
1970-71	24,000	6,718	85	4,481	19%	67%	60	71%	2,236	9%	33%	25	29%	1,864	8%	28%	83	17	20%	68%	372	2%	6%	17%	8	9%	32%	20%	47%
BOTH YEARS COMBINED	59,000	35,479	248	22,254	38%	63%	150	60%	13,224	22%	37%	98	40%	12,024	20%	34%	91%	81	33%	83%	1,199	2%	3%	9%	17	7%	17%	10%	21%
PHILADELPHIA SUBAREA																													
1969-70	180,000	99,810	985	69,869	39%	70%	694	70%	29,941	17%	30%	291	30%	25,064	14%	25%	84%	258	26%	89%	4897	3%	5%	16%	33	3%	11%	19%	13%
1970-71	118,000	44,389	309	26,979	23%	61%	177	57%	17,409	15%	39%	132	43%	16,512	14%	37%	95	123	40%	93%	897	1%	2%	5%	9	3%	7%	5%	7%
BOTH YEARS COMBINED	298,000	144,199	1,294	96,848	32%	67%	871	67%	47,350	16%	33%	423	33%	41,576	14%	29%	89%	381	29%	90%	5774	2%	4%	12%	42	3%	10%	14%	11%
NEW YORK SUBAREA																													
1969-70	860,000	247,404	1,997	118,272	14%	48%	510	26%	129,131	15%	52%	1,487	74%	127,381	15%	51%	99%	1,454	73%	98%	1,750	22%	.7%	1%	33	2%	2%	1%	2%
1970-71	846,000	142,314	1,202	94,046	11%	66%	464	39%	48,267	6%	34%	738	62%	47564	6%	33%	99%	729	61%	99%	702	.08%	.49%	1%	9	.75%	1%	1%	2%
BOTH YEARS COMBINED	1,706,000	389,718	3,199	212,318	12%	54%	974	30%	177,398	10%	46%	2,225	70%	174,945	10%	45%	99%	2,183	68%	98%	2452	.14%	.63%	1%	42	1%	2%	1%	2%
RECAPITULATION - BOTH YEARS COMBINED																													
FLORIDA	421,000	167,894	2,149	123,823	29%	74%	1,786	83%	44,070	10%	26%	363	17%	35,224	8%	21%	80	29	14%	80%	8,845	2%	5%	20%	72	3%	20%	25%	25%
WASHINGTON	59,000	35,479	248	22,254	38%	63%	150	60%	13,224	22%	37%	98	40%	12,024	20%	34%	91%	81	33%	83%	1,199	2%	3%	9%	17	7%	17%	10%	21%
PHILADELPHIA	298,000	144,199	1,294	96,848	32%	67%	871	67%	47,350	16%	33%	423	33%	41,576	14%	29%	89%	381	29%	90%	5774	2%	4%	12%	42	3%	10%	14%	11%
NEW YORK	1,706,000	389,718	3,199	212,318	12%	54%	974	30%	177,398	10%	46%	2,225	70%	174,945	10%	45%	99%	2,183	68%	98%	2452	.14%	.63%	1%	42	1%	2%	1%	2%
TOTALS OF ENTIRE SAMPLE	2,484,000	737,290	6,890	455,243	18%	62%	3,781	55%	282,042	11%	38%	3,109	45%	263,769	11%	36%	94%	2,934	43%	94%	18,270	.75%	2%	6%	173	3%	6%	7%	6%

APPENDIX I

Joint Exhibit 1—Stipulation of Parties, Dated April 15, 1974.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

[SAME TITLE.]

It is hereby stipulated by and between the parties as follows:

1. The attached affidavit of Sam Muscarnera, sworn to April 15, 1974, is to be received in evidence as a respondent's exhibit in support of respondent's first Affirmative Defense, with the same force and effect as if the affiant had testified, in these proceedings, to the same effect as set forth therein.

2. Complaint counsel acknowledge that, although they have not conducted discovery proceedings with respect to Fedders' post-1971 advertising material, no facts at variance with those asserted in Mr. Muscarnera's aforesaid affidavit have come to their attention. It is understood, however, that such acknowledgment embraces only the factual assertions set forth in such affidavit, and does not constitute acquiescence by complaint counsel (a) in Mr. Muscarnera's contention, at ¶10 of his affidavit, that the only claim challenged by the complaint herein is that of the uniqueness to Fedders of reserve cooling power, (b) in Mr. Muscarnera's conclusion, at ¶5 of his affidavit, that the supporting information for the seven other claims therein referred to was legally adequate, or (c) in his general conclusions set forth in the final paragraph of the affidavit, at page 5 thereof.

Joint Exhibit 1—Stipulation of Parties, Dated April 15, 1947

3. Except for such matter as may already be of record in this proceeding, neither side will submit any evidence in respect to the first Affirmative Defense other than the within stipulation and affidavit.

Dated: April 15, 1974

Heidi P. Sanchez

PAUL G. FOLDES
Complaint Counsel

Sydney B. Wertheimer,
Counsel for Respondent
Fedders Corporation

Joint Exhibit 1—Affidavit of Sam Muscarnera.

UNITED STATES OF AMERICA,

BEFORE FEDERAL TRADE COMMISSION.

IN THE MATTER

of

FEDDERS CORPORATION, a corporation.

Docket No. 8932

State of New Jersey,
County of Middlesex, ss:

SAM MUSCARNERA, being duly sworn, deposes and says:

1. I am House Counsel for Fedders Corporation, and have acted in that capacity since the year 1970.

2. The instant proceedings had their origin in the Commission's letter to Fedders dated October 13, 1971 enclosing an order to file a Special Report concerning the substantiation for certain advertising claims—eight in number—specifically listed therein by the dates of the advertisements and the media in which they appeared.

3. The order was dated September 30, 1971, and required that the information requested be furnished within sixty days after the date thereof.

4. During this sixty-day period, which was extended by another twenty days at Fedders' request, I held a number of meetings, principally with members of Fedders' engineering and advertising departments, to review the orders and assemble the material in response thereto.

5. Only one of the claims involved was a claim that the attribute or characteristic advertised was unique to Fed-

ders. The other seven claims did not assert or concern uniqueness. It was concluded that although adequate supporting information existed for these seven other claims, the claim of uniqueness--which was in respect to the attribute called "reserve cooling power"—could not be substantiated.

6. Fedders' Special Report was embodied in a hard cover booklet, some 80 pages in length, which was mailed off to the Commission on December 20, 1971 and filed with the Commission on December 22, 1971. In light of the lack of substantiation for the uniqueness claimed in respect to reserve cooling power, Fedders' response, in respect to this claim, was as follows:

> "As to the claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate" (Special Report, p. 3).

7. The Commission's questionnaire alerted Fedders to the necessity of more careful preparation of advertising material in order to avoid statements which lacked support or might be misleading. Accordingly, in preparing advertising material intended for dissemination in the following year (1972), greater care was taken to eliminate such objectionable material, and, in a bulletin to all distributors, dated December 22, 1971—the same day the Special Report was filed with the Commission--Fedders advised all of its 70-odd distributors that they and their dealers were not to use any of the ads provided in 1971, and that they were not to make any claims for a Fedders product which were not made in Fedders-supplied 1972 ads or literature. A copy of this bulletin is attached hereto.

8. As the bulletin indicates, Fedders went further than to merely eliminate any claim that "reserve cooling power"

was unique to its products. In fact, it eliminated, in its future advertising material, *any* reference to reserve cooling power, as well as certain other claims which although adequately supported, it decided as a matter of policy not to use any longer.

9. Shortly following the issuance of the bulletin above referred to, the Fedders management, in order to maintain even firmer control, insofar as possible, over the content of the many thousands of pieces of advertising material promulgated by its advertising personnel during the course of each selling season directed that all such material be submitted to me for review in advance of its dissemination.

10. Keeping in mind the understandable, though sometimes regrettable tendency of advertising personnel to exaggerate the virtues or attributes of the products they sell, I have done my best, in carrying out this duty, to prevent the promulgation of unsubstantiated claims without, in the course of so doing, unduly dampening the enthusiasm of the personnel involved. I believe that in all material respects I have been successful in this endeavor. No further claims of any kind have been made with respect to "reserve cooling power" (see p. 3, affidavit of Paul C. Anderson, sworn to November 12, 1973, attached to Response to Commission's Motion for Summary Decision). In this connection it should be borne in mind that the only claim challenged by the Commission's complaint herein is the claim that reserve cooling power is unique to Fedders. Furthermore, I do not know of any advertising claim which Fedders has promulgated since December 22, 1971, (the date of the bulletin to distributors above referred to) which was not adequately substantiated in all material respects, and to the best of my knowledge there was none.

Joint Exhibit 1—Affidavit of Sam Muscarnera

11. Fedders' general counsel has called to my attention an advertisement for "Climatrol" brand central air conditioners which appeared in the March 4, 1974 issue of Newsweek magazine, and which claimed, among other things, that the rotary compressor of the unit was "exclusive".* Climatrol brand units are manufactured by Fedders, and marketed through a wholly-owned subsidiary of Fedders known as Mueller Climatrol Corp. I understand that the advertisement had been sent to general counsel informally by complaint counsel herein, and that complaint counsel had questioned the use of the word "exclusive" in light of the fact that similar products, also manufactured by Fedders, are marketed by Fedders itself under the "Fedders" label.

Mueller Climatrol Corp., in contrast to the great majority of the Fedders subsidiaries and divisions, is semi-autonomous, and its sales and advertising staff operate independently of the advertising organization and personnel of Fedders itself. Consequently, up to the time the above advertisement appeared, Mueller Climatrol Corp. had not cleared its advertising through me, as had the other Fedders divisions. Mueller Climatrol Corp. had nevertheless been advised by Fedders' management to avoid the use of the word "exclusive" in any context wherever possible and accordingly, as early as October 15, 1973—more than four months prior to the Newsweek ad—had substituted in some of its ads the word "exciting" for the word "exclusive" as applied to the rotary compressor. The reason for the change was that, although the exclusivity of the Fedders rotary compressor in the residential central air conditioning field cannot be challenged, the fact that Fedders-manufactured products are sold under two different brand names (Fedders and Climatrol) could, from a highly technical standpoint, create some doubt as to an "exclusivity" claim made by either brand

*A copy of the ad is attached hereto.

individually, unless accompanied by appropriate explanatory material to the effect that the exclusivity claim was that of the manufacturer rather than that of the brand.

12. Unfortunately (I understand due to an oversight) Mueller Climatrol Corp. did not remove the word "exclusive" from all of its advertising relating to rotary compressors, and, as aforesaid, I did not become aware of this until the March 4, 1974 Newsweek ad came to my attention a week or so after it appeared. Thereupon Fedders' top management immediately instructed *all* Fedders divisions and subsidiaries, without exception, to clear their advertising through me, and, in turn, I immediately instructed all advertising personnel that the word "exclusive" was not to be used in any further advertising material promulgated by Fedders in regard to the rotary compressor, and that any existing such material containing that word was to be withdrawn as soon as possible. This was done expeditiously, and I am advised that by the third week in March all such material had been recalled.

I do not consider that the above Climatrol incident constituted a material or significant departure from Fedders' policy and practice of sincerely and strenuously seeking to avoid misleading or unsubstantiated claims. Furthermore, even assuming, *arguendo,* the truth of the allegations of the Commission's complaint charging Fedders with promulgating deceptive advertising in the respects set forth therein, I submit that under all the circumstances the likelihood of Fedders' repetition of the offending practices charged is exceedingly remote.

(Sworn to by Sam Muscarnera, April 15, 1974.)

Bulletin and Advertisement, Attached to Affidavit.

(See opposite page.) ☞

FEDDERS
ROOM AIR CONDITIONERS

ADVERTISING & PROMOTION BULLETIN

RAC 72-02
12/22/71

NEW ADVERTISING REGULATIONS

You've been reading it in the newspapers and magazines, hearing it on the radio, seeing it on TV ... the government is cracking down on advertising. You have to be able to prove what you say. You have to prove it, we have to prove it, your dealer has to prove it.

As you know, we have always been extra careful about what has been said in Fedders advertising and printed materials. There never has been any intent to mislead the customer by using untrue statements or statements that could not be proved. Still, we are taking an even harder look at all of our advertising for 1972. We are eliminating every phrase that could possibly be questioned by the FTC.

When you look at these ads and others, you'll see what we mean .. Old powerful selling friends like "Reserve Cooling Power", "multi-room cooling", "cools three rooms, even a small home", "installs in minutes", "germicidal filter" are no longer. Not that they are not provable or that they are misleading, but simply because the explanation and qualifications that would have to be included in each ad would take up too much space.

Advise your dealers they are not to use any of the ads provided in 1971 and earlier years. Dealers, department stores and others who make up their own ads must not make any claims for the Fedders product that are not made in Fedders supplied 1972 ads or literature. Advertisers who violate this requirement may, on their own, have to answer FTC and the advertisements will not be eligible for co-op.

These new regulations apply to all media, TV, radio, magazines, newspapers, billboards, wherever Fedders is advertised.

You must be responsible for your dealers advertising. If not, you will be responsible to FTC.

R. E. Ireland
Director of Advertising & Sales Promotion

REI:cj

BY CLEM MORGELLO

WALL STREET

WILD OATS

The stock market staged a brisk rally last week. But trading volume wasn't much to speak of, and in any case prices are still well below where they were a year ago. The commodities market, on the other hand, has gone wild. The Dow Jones index of commodities futures has risen 25 per cent since November, while stock prices have declined 10 per cent. Even that understates the gains that many commodities traders have been enjoying. It is by no means rare for them to triple their money in a matter of two or three months.

Many of them can lose their money, too, make no mistake about that, for the commodities market is both more tricky and more risky than the stock market. The weather in Ghana, ocean currents off Peru and many other non-business developments affect it. Despite these hazards, growing numbers of speculators have taken the plunge. Trading volume rose 50 per cent last year, and there are now about 500,000 commodities traders, estimates Perry Cracraft of Clayton Brokerage Co., one of the biggest commodities houses in the country.

The worldwide boom in commodities prices has been stimulated by shortages and the inflation fears that rising commodities prices themselves help create. Investors and speculators are simply fleeing from insecure paper money.

HOW IT WORKS

Speculators don't buy commodities, of course. They trade in futures contracts that give them the right to purchase copper, silver or some other product for a fixed price at a fixed time. They never intend to take delivery of the items. Instead they bet that prices will rise so that they can sell their contracts at a profit. Speculators also sell commodities contracts short in the hope of profiting from declining prices, just as they do with stocks. But mostly they buy "long," betting that prices will rise.

Fast action and leverage are the big attractions in commodities. While investors who buy stock on margin must put up half the purchase price, a commodities plunger can get by with a down payment equal to only 5 to 10 per cent of the value of a futures contract. For example, last July, a plunger could buy a futures contract for 50,000 pounds of March Maine potatoes for $300. At the time, potatoes were selling for 4 cents a pound; today they are going for 12 cents. If the speculator sells now, he will make a $3,700 profit on the contract.

For plungers who don't have the down payments for a futures contract, there's a cheaper way to play the commodities game—through commodities options. For a fixed premium, the small-time speculator gets the right to buy a futures contract at a fixed price for a fixed period of time. If the price rises, he can sell his option at a profit. The only thing he risks is the amount of his premium—typically $200 or $300 vs. $1,000 or more for the futures. And with futures contracts, speculators are called on to put up more margin if the price of a commodity goes down instead of up, increasing the potential loss.

NO EASY TASK

It all sounds easy—a low down payment and a chance to triple your money if prices rise a few cents. But it isn't easy. Fortunes have been lost as well as made in commodities, and by some of the most sophisticated investors. Paul Erdman, author of the best-selling novel "The Billion Dollar Sure Thing," in real life lost more than $60 million for the Swiss bank he ran by speculating in cocoa futures.

Thus, while it takes a good deal of savvy as well as luck to operate successfully in the commodities market, that is no deterrent to truck drivers, shoe clerks and elderly widows who want to enjoy the thrill of the fast-moving commodities game. But if they want to operate successfully, advises Clayton's Cracraft, they should set a limit on how much they can afford to lose—and get out when they lose it. Unfortunately, most investors find it difficult to follow such advice.

Prices have soared so much in recent months that commodities may be ripe for a reaction. But Cracraft isn't worried. A growing world population in the face of limited supplies of all kinds of commodities will keep the market strong, he says. While he's not too keen at the moment on cattle, hogs, eggs, chickens, lumber and copper, he's bullish on a wide range of other products—from coffee, cocoa and sugar to wheat, corn, silver and gold.

THE WEEK'S ACTION FEB. 19-22

	Close	Point Change	Volume in millions of shares
DOW JONES Industrials	855.97	+35.07	
NYSE Composite	51.99	+1.66	57.9
AMEX	96.10	+1.51	9.7
NASDAQ Composite	92.01	+1.99	9.2

Point III of Appeal Brief by Respondent, Fedders Corporation From Initial Decision.

Assuming that the Complaint is not to be dismissed, the Administrative Law Judge's proposed Order is impermissibly broad.

Paragraph 2 of the proposed Order commands that respondent make no statement or representation in any advertising as to any performance characteristic of any of its air conditioners unless respondent has a reasonable basis for such statement or representation which may consist of scientific, engineering or other similar objective materials, or industry-wide standards based on such material.

But there is no claim in this proceeding that respondent made any false claim as to the performance characteristics of its air conditioners. The only claim of deception is that an unchallenged* performance characteristic, to wit, reserve cooling power, was falsely represented to be exclusive or unique to respondent, *i. e.*, that no other manufacturer's machines also had such a performance characteristic.

In Finding 25 of the Initial Decision the Administrative Law Judge, in capsulizing the complaint, concludes as follows:

> "Thus, the unlawful representations made by Fedders, which are challenged in the complaint, arise from the 'uniqueness' claim for Fedders air conditioners, as set forth in Paragraph Six of the complaint."

*See Finding 26, last sentence.

Point III of Appeal Brief by Respondent, Fedders Corporation From Initial Decision

Hence there was no issue litigated in this proceeding as to whether or not respondent misrepresented any performance characteristic of its machines.

True, the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past, *FTC v. Ruberoid Co.*, 343 U. S. 470 (1952); and in order to insure that the offending practice will not be repeated the Commission has the power to enjoin similar and like practices. But it is clear that the Commisison's discretion does not extend to enjoining conduct which is wholly unrelated to the offending conduct found to have existed. *Jacob Siegel Co. v. FTC*, 327 U. S. 608 (1946). See also *Country Tweeds, Inc., v. FTC*, 326 F. 2d 144 (2d Cir., 1964) and *American Home Products Corporation v. FTC*, 402 F. 2d 232 (6th Cir., 1968). In *Royal Milling Co., v. FTC*, 288 U. S. 212 (1933), the Supreme Court espoused the principle that

> "[t]he order should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; * * *."

Similarly, in *Siegel v. FTC, supra*, the Supreme Court stated (327 U. S. at pp. 612-613) "* * * [The Commission] has wide latitude for judgment and the Courts will not interfere *except where the remedy selected has no reasonable relationship to the unlawful practices found to exist.*" (Emphasis added.)

The Courts do not hesitate to strike down or modify orders to cease and desist, which they consider too sweeping, on the ground that such orders are too broad, too vague or both. In the field of advertising, the case of *American Home Products Corporation v. FTC, supra*, in-

volved the deceptive advertising of a preparation used in the treatment of hemorrhoids. The Commission's order prohibited the company from disseminating "any advertisement * * * of any drug which misrepresents directly or by implication the efficacy of such drug." The Court, holding that "an order of the Commission must bear a reasonable relationship to the unlawful practice found to exist" struck out this provision as too broad in that it went beyond the particular drug ("Preparation H") in respect to which the advertisement was disseminated.

In *Country Tweeds, Inc. v. FTC, supra,* petitioners were guilty of misrepresenting the quality of cashmere through the misuse of testing company results. The order was framed to prohibit them from "misrepresenting in any manner the quality of cashmere or other fabric in their merchandise". The Circuit Court struck this language as far too broad, saying at 326 F. 2d 149:

> "It is difficult to imagine an order couched in more sweeping language than the one now before us. Petitioners, found guilty of misrepresenting the quality of their cashmere through the misuse of test results, have been ordered to refrain from misrepresenting 'in any manner' the quality of their fabrics. This Court, subsequent to *Hoving v. F.T.C., supra,* in a series of recent cases dealing with illegal payments to buyers under Section 2(d) of the Clayton Act, as amended, 15 U.S.C. §13(d), and Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, has not hesitated to modify broad Commission orders which went beyond the particular illegal practices found to exist. *American News Co. v. F.T.C.,* 300 F. 2d 104 (2d Cir.), cert. den., 371 U. S 824, 83 S. Ct. 44, 9 L. Ed. 2d 64

Point III of Appeal Brief by Respondent, Fedders Corporation From Initial Decision

(1962); *Grand Union Co. v. F.T.C.*, 300 F. 2d 92 (2d Cir. 196.); *Swanee Paper Corp. v. F.T.C.*, 291 F. 2d 833 (2d Cir. 1961), cert. den., 368 U. S. 987, 82 S. Ct. 603, 7 L. Ed. 2d 525 (1962). See also *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480, 487 (2d Cir. 1963), where the court, though refusing to accept some modifications proposed by petitioner, nevertheless did narrow the order to make it 'somewhat better related to * * * [petitioner's] offending while still sufficiently prohibiting "variations on the basic theme".'

"The principles which prompted this court in the above cases to narrow Commission orders apply with equal force here, though the violation to which the instant order is directed is deceptive advertising. The First Circuit, on two occasions, has been critical of Commission orders directed to deceptive advertising and labeling which were, in some respects, less broad than the order now before us. *Korber Hats, Inc. v. F.T.C.*, 311 F. 2d 358 (1st Cir. 1962); *Colgate-Palmolive Co. v. F.T.C.*, 310 F. 2d 89 (1st Cir. 1962)."

In *Spiegel, Inc., v. FTC,* 411 F. 2d 481 (7th Cir., 1969) the offense of the respondent, a Chicago catalogue house, consisted of falsely representing the "regular price" of its products and that savings could be realized by purchasing them in combination, *i. e.,* by purchasing a second item for $1.00. The Commission's order restricted Spiegel from "misrepresenting in any manner the savings available to purchasers of respondent's merchandise." The Court, also quoting the Supreme Court's rule in the *Siegel* case, *supra,* that an order is too broad if it bears "no reasonable relation to the unlawful practices found" struck out this provision.

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In *Korber Hats, Inc., v. FTC,* 311 F. 2d 358 (1st Cir., 1965) Korber was charged with deceptive labeling of men's straw hats as "Genuine Milan." The hats in fact were made from Phillipine hemp imported from Japan. A portion of the Commission's order directed Korber to refrain from "using any words or phrases which, directly or indirectly, represent that said products are manufactured in a given country or out of certain materials or in a particular manner or style unless such is the fact." The Court, in returning the case to the Commission for other reasons, observed that the order was too broad.

The case of *Gimbel Bros., Inc., v. FTC,* 116 F. 2d 578, 579 (2d Cir., 1941) cited at page 26 of the Initial Decision in another connection, is very closely in point on the issue of scope of remedy. In that case, as set forth in the opinion itself, at 116 F. 2d 579,

> "the gist of the complaint was that the petitioner represented mixed goods as all wool; but there was no charge that the petitioner had been selling mixed goods as such without describing each constituent fiber in the order of its predominance by weight, or specifying the percentage of the various ingredients. An order to desist from such a practice goes beyond the complaint, and to that extent the order is improvident."

The Court went on to modify the Commission's order, by eliminating the provisions thereof requiring constituent fibers to be described by percentage and order of predominance.

In determining the appropriate scope of a cease and desist order the Courts take into consideration, in addi-

tion to the scope of the particular offenses charged and proved, a wide variety of other factors. For instance, the Circuit Court for the District of Columbia, in *Joseph A. Kaplan & Sons Inc. v. FTC,* 347 F. 2d 785 (1965) stated, at page 789:

> "* * * In the exercise of this discretion, the Comsion can properly consider many factors, such as the frequency and duration of the violations, the business and competitive history of the respondent, including history of past violations, and the likelihood that the respondent knew or should have known that its conduct was unlawful. This enumeration is by no means exhaustive * * *."

In *Country Tweeds, Inc., v. FTC, supra,* the Court said at 326 F. 2d 149:

> "* * * We think it advisable again to note that petitioners in this case have ceased to engage in the advertising practice which prompted the order and voluntarily did so well before the Commission filed its complaint. Cessation of the offending activity, with the likelihood that the petitioner will not again resume it or a related activity has been one factor which courts have considered in limiting broad Commission orders. *Grand Union Co. v. FTC, supra,* 300 Fed. at 100; *Swanee Paper Corp. v. FTC, supra,* 291 F. 2d at 838."

In *Swanee Paper Corporation v. FTC,* 291 F. 2d 833 (2d Cir., 1961), *cert. den.* 368 U. S. 987 (1962) (a §2(d) Robinson Patman case)—the Court, stating that "nothing in the record here indicates flagrant or extensive violations of Section 2(d)," struck down a Commission order which enjoined Swanee from violating §2(d) in the very words

of the statute, and held that "the order should be limited to the particular practice found to violate the statute * * *." The offending practice involved was a relatively narrow one. It consisted of arranging for a customer to obtain valuable advertising space on a "spectacular" sign at nominal cost, on a basis not available to other customers on proportionately equal terms.

It is, of course, obvious that the factors which the Courts take into consideration in determining whether or not a cease and desist order should issue (see Point I, *supra*) are, *a fortiori,* relevant to a determination of its scope.

Applying the above legal principles to the case at bar, it is abundantly clear that the Order is much too broad. First of all, the Administrative Law Judge has found (Findings 25 and 26) that in essence there is but a single offense charged, namely, falsity of the representation of *uniqueness* of a particular feature or performance characteristic of respondent's room air conditioners known as "reserve cooling power." That respondent's room air conditioners *do* have that performance characteristic has not been challenged, nor has the Commission challenged any other performance characteristic claimed by respondent in respect to any of its products. The Administrative Law Judge, in attempting to make it appear that the false claim of uniqueness is a false performance claim and thereby create a springboard from which to enjoin every conceivable performance characteristic claim, without limitation, states the following in the first sentence of the last paragraph of page 29 of the Initial Decision:

> "Respondent has admitted disseminating a false performance claim for its room air conditioners re-

Point III of Appeal Brief by Respondent, Fedders Corporation From Initial Decision

> lating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity."

But respondent has not admitted disseminating a false performance claim nor, as aforesaid, is any performance claim at issue herein. Also as aforesaid, the Administrative Law Judge has found that the RCP performance claim (namely, the claim that respondent's room air conditioners do perform satisfactorily in conditions of extreme heat and humidity) is not disputed (Finding 26). It is accordingly clear, from all of the evidence that the only false claim that respondent admitted making was the claim that a concededly true performance characteristic of its products was an attribute of its products only, and not an attribute of the products of others. This *uniqueness* claim is clearly not a *performance* claim, and the above-quoted exercise in semantics cannot change that fact.

The Administrative Law Judge relies upon *The Firestone Tire & Rubber Co.*, Docket 8818, 81 FTC 398, 475 (1972), *aff'd* 481 F. 2d 246, 250 (6th Cir., 1973), *cert. den.* 42 U.S.L.W. 3362 (December 18, 1973), as authority for recognizing the propriety of orders governing all performance characteristics. The *Firestone* case differs in material respects from this case. In the first place, in *Firestone* the advertiser actually had made false claims as to performance characteristics of its tires. Among others, the advertisement claimed that the Firestone tire "stops 25% quicker". This performance claim was deceptive and without substantial scientific test data to support it. As aforesaid, in the instant case there is no performance claim involved. Additionally, in *Firestone* the Commission emphasized that it was dealing with a product directly related to human safety, which is not the case with air conditioners. It could well be said that all of the

many performance characteristics of a tire, such as its stopping ability, its freedom from blowouts, its "cornering ability" are closely related to safety. Hence, an order which may have been proper in *Firestone,* because of the nature of the product there involved, is inappropriate in the instant case.

It is respectfully submitted that the Administrative Law Judge's argument that Paragraph 2 of the Order is not burdensome because it merely sets forth the presently existing obligation required under *Pfizer,* is specious. That argument completely disregards the severe penalties of $10,000 per violation for anyone who violates an order of the Commission (15 U.S.C. 45(1), as amended November 16, 1973 by Public Law 93-153, Sec. 408(c)). It also completely disregards the fact that *Pfizer* does not require that the reasonable basis for a statement must be substantiated by scientific engineering or similar objective materials, as does the Order in the instant case.

Under the circumstances, it is respectfully submitted that the scope of the Order be confined to false or unsubstantiated representations of the *uniqueness* of any characteristic or feature of respondent's air conditioners. Such an extension beyond the precise misrepresentation made (uniqueness of a single performance characteristic, namely, "reserve cooling power"), is, arguably, logical. However, it is imperative, in order to keep the Order within the bounds of a reasonable relationship to the offense charged, that it be confined to unfounded claims of uniqueness. Such an order would compel the respondent to "toe the mark" in an area of advertising which is both broad and critical without transgressing the bounds of due process. It is obvious that, particularly in the field of appliances such as air conditioners, a claim by a manufacturer that

its product is unique in any particular respect is generally an important and powerful sales argument, and it is in this area where much of the interplay of competition appears between competitive brands. Moreover, emphasis upon uniqueness of new features as a sales argument must continue into the indefinite future as the art of manufacture progresses.

Bearing in mind that, aside from the narrowness of the scope of the offense charged in the case at bar, all of the qualities which the courts and the Commission consider as pointing toward a narrowing of the scope of the Order (clean FTC record, discontinuance before filing of the complaint, complete cooperation with the Commission, and above all, lack of flagrancy of the basic offense) are in respondent's favor, it is respectfully submitted that confining the scope of the Order to claims of uniqueness of any characteristic would be a sound and valuable "middle ground" which would, in the words of *Vanity Paper Mill, Inc. v. FTC*, 311 F. 2d 480, 487 (2nd Cir. 1963) "be somewhat better related to [respondent's] offending while still sufficiently prohibiting 'variations on the basic theme'."

For the aforesaid reasons, respondent hereby submits a proposed order which would eliminate paragraph 2 of the Order entirely because of its impermissible breadth, and would modify paragraph 3 accordingly.

Point III of Appeal Brief by Respondent, Fedders Corporation From Initial Decision

Conclusion

The Complaint should be dismissed, or, if the Commission considers that it should not be dismissed, the Order entered herein should be in the form and substance of the Order submitted by respondent in substitution for the Order of Administrative Law Judge.

Respectfully submitted,

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MODLIN & WERTHEIMER
Attorneys for Respondent
Fedders Corporation

SYDNEY B. WERTHEIMER
ADOLPH KAUFMAN
JEFFREY H. SCHNEIDER
Of Counsel

Order Proposed by Respondent.

IT IS ORDERED that respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

   (a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the uniqueness of any feature of any of respondent's air conditioners;

   (b) which provided the basis upon which respondent relied as of the time the claim was made; and

   (c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last

disseminated by respondent or any division or subsidiary of respondent.

The provisions of Paragraph 2 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

IT IS FURTHER ORDERED that respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

IT IS FURTHER ORDERED that respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

Appendix II to Appeal Brief by Respondent, Fedders Corporation From Initial Decision.

Appendix II

Summary of the Extent to Which the Unique RCP Claims Were "Featured" or Otherwise Emphasized in the Advertisements in Which Such Claims Appear

The 173 unique RCP insertions, broken down into subareas, are as follows: (spread sheet, Col. 7E)—Florida 72, Washington, D.C. 17, Philadelphia 42, New York 42. Examination of the texts of these advertisements, contained in Respondent's Exhibit 1, discloses that the unique RCP claim was featured (that is, was the only claim made, or was emphasized as such by type, size, style or position in the ad) in only a small minority of instances, as follows:

subarea	*Total insertions with unique RCP claims*	*Insertions where unique RCP claim is featured*
Florida	72	6
Washington, D.C.	17	5
Philadelphia	42	1
New York	42	24*
	173	36

*Of these 24 "featured" insertions in New York, 19 were in small town newspapers with circulations of from 5,100 to 10,200. The other 5 insertions were also in small town papers, most of which had circulations in the 30,000-35,000 range, and the largest of which had a circulation of 66,000. It is also significant that in the New York subarea, insertions with unique RCP claims comprised only 1% in terms of cost and only 2% in terms of number of insertions of all insertions with RCP claims for the two-year period involved (spread sheet, Columns 7D and 7G) and their cost was only slightly more than 1/10th of 1% of respondent's total advertising expense in that area (spread sheet, Col. 7B).

Appendix II to Appeal Brief by Respondent, Fedders Corporation From Initial Decision

Thus, out of the entire 173 insertions containing unique RCP claims, only 36 unique RCP claims were featured as such in the ad in which they appeared, and in the other ads the unique RCP claims was included, without special emphasis, among a number of other claims.

Furthermore, as indicated in the extreme right hand column headed "Circulation" of the subarea breakdowns contained in Respondent's Exhibit 1, in the Florida subarea the majority of the ad insertions with unique RCP claims were in newspapers with circulations of less than 50,000 (Respondent's Exhibit 1, pp. (b) and (r)). In the Washington, D. C. subarea most of such insertions were in very small publications (none with a circulation of over 30,000 and most under 12,000) (Respondent's Exhibit 1, pp. (z-11)). In the Philadelphia subarea, roughly one-half of the insertions were in small town or small city publications, with circulations of under 100,000 (Respondent's Exhibit 1, pp. (z-20) and (z-34)). In the New York City subarea all of the insertions, without exception, were in small town or small city newspapers, the largest with a circulation of 66,000 and most in the range of 10,000-25,000 (Respondent's Exhibit 1, pp. (z-42) and (z-53)). Moreover (see the pages of Exhibit 1 hereinabove referred to), the only publications used with a circulation of 150,000 or more were in Florida and in Philadelphia; the insertions in these larger media were relatively few, and not a single one of them featured the unique RCP claim made therein. In every instance it was included in small type, and without emphasis, among a considerable number of other claims.*

*As evidenced by the following pages of Respondent's Exhibit 1: Exhibit 1(c) [Tampa Tribune]; Exhibits 1(g) and 1(t) [St. Petersburg Independent]; Exhibit 1(z-10) [Jacksonville Journal]; Exhibit 1(z-21) [Community Newspaper, Philadelphia]; Exhibit 1(z-22) [Philadelphia Inquirer] and Exhibit 1(z-39) [Tabloid, Philadelphia].

Excerpt From Page 9 of Respondent, Fedders Corporation's Reply Brief.

Respondent concedes that, if the Commission rejects respondent's defenses, the Commission need not limit its order to the precise offending practice charged (the representation, contrary to the fact, that reserve cooling power was an attribute unique to respondent's products). Accordingly, paragraph 1 of the proposed order, which enjoins future misrepresentations of uniqueness of respondent's air conditioners in *any* material respect, could be justified as "like and related". However, if paragraphs 2 and 3 of the proposed order are drawn so as to extend the scope of the order to all performance characteristics of respondent's air conditioners such extension would constitute an abuse of the discretion vested in the Commission. Since the complaint did not charge, and complaint counsel did not establish, that respondent had misrepresented, in any respect, any performance characteristic of its products, the order, within the doctrine of *Jacob Siegel Co. v. FTC,* 327 U. S. 608 (1946) (cited at Initial Decision, page 28, Answering Brief, page 24 and respondent's Appeal Brief, (page 26) would not have a "reasonable relationship to the unlawful practice found to exist" and would, in the words of *Royal Milling Co. v. FTC,* 288 U. S. 212 (1933) (cited at respondent's Appeal Brief, page 26) "go . . . further than is reasonably necessary to correct the evil . . .".

Respectfully submitted,

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MODLIN & WERTHEIMER
Attorneys for Respondent
Fedders Corporation

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ADOLPH KAUFMAN
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